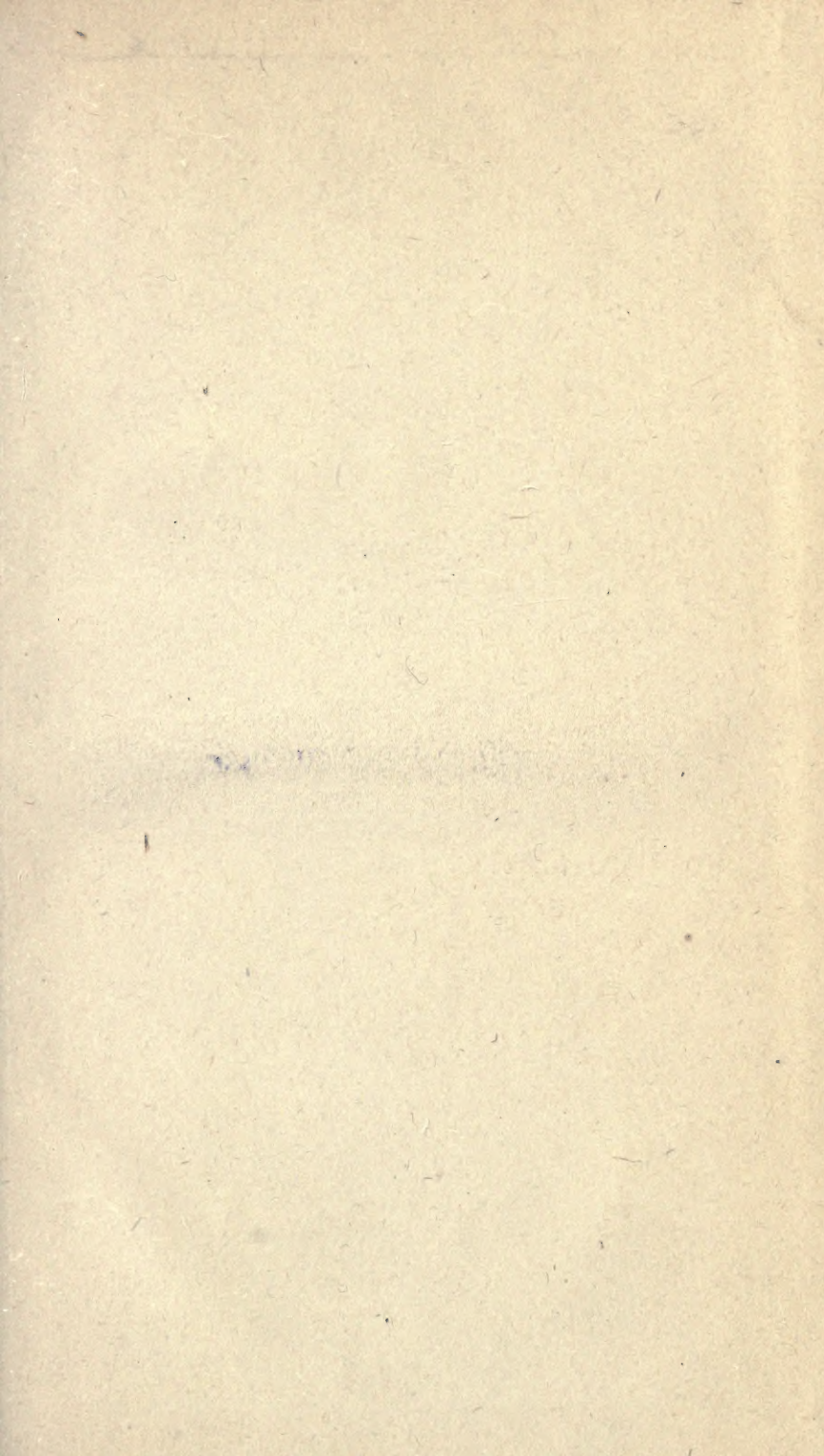


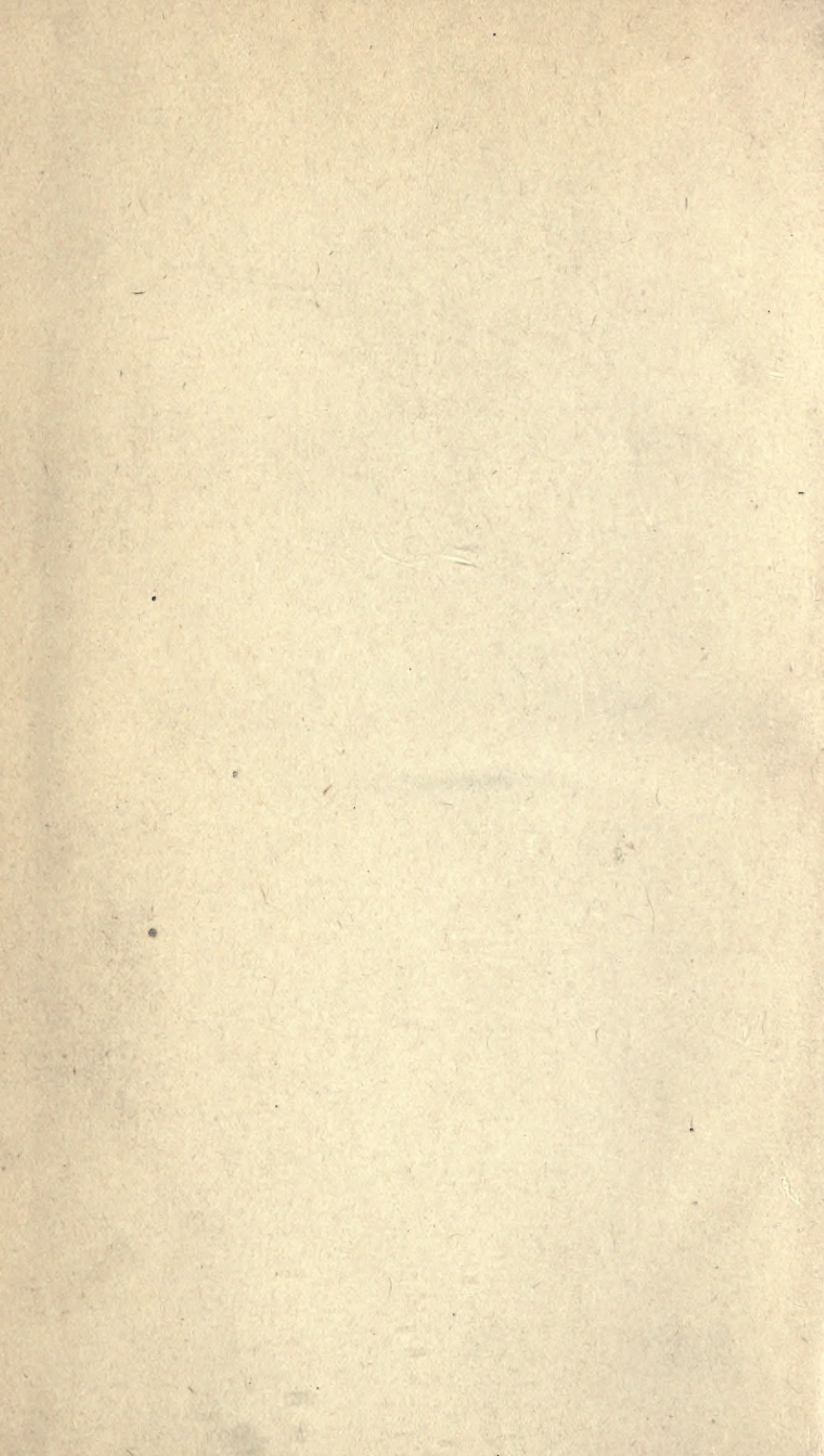


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REPORTS
OF
C A S E S
ARGUED & DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND,

IN 1820, 1821, 1822, AND PART OF 1823,

BY THOMAS HARRIS,

Clerk of the Court of Appeals,
and

REVERDY JOHNSON,

Attorney at Law.

VOLUME V.

WERRICK & ALLEN

ANNAPOLIS:
PRINTED BY JONAS GREEN.

1825.

ST JOHN

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ERRATA.



PAGE. LINE.

- 4 30 After county insert court,
12 37 After denison insert and there be a devise to him. After heirs insert
(.)
14 8 For Fern read Fearn.
35 For 2 Harr. & M. Hen. read 1 Harr. & M. Hen.
15 34 After Ab. insert 43.
21 26 After heir insert (,) and after living erase (,).
32 35 For instanter read instanti.
86 In the marginal notes for his wherever it occurs read her.
111 18 In the marginal note for aliundi read aliunde.
152 3 &c. After Hills wherever it occurs insert and.
156 1 After with insert Yates his Forbearance and.
171 29 After Ante insert 153, 162.
177 34 After Elizabeth insert Sarah.
185 18 After bequeathed insert the same to his wife for life, and after her
death.
38 For 24 read 28.
188 34 Erase the first or.
208 10 For 1787 read 1757.
211 36 For appellant read appellee, and for appellee read appellant.
217 24 Erase (;) and and.
226 22 For Twinn read Twiver; for Triviser read Twifer.
254 10 Erase (,) and insert (.) begin On.
267 12 For four read three.
273 28 For compose read composed.
307 1 For proceedings read proceeds.
314 21 After death insert Thomas C. D. Ford, his son and heir at law, and
the father of.
25 Before Ford insert Thomas C. D.
358 12 After non user insert (;)
368 At the end of the case refer to the note in page 500.
419 20 For cause read case.
435 16 After defendant erase (;) and insert (,).

NAMES OF THE JUDGES OF THE COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

Hon. JEREMIAH TOWNLEY CHASE, Chief Judge.
Hon. JOHN BUCHANAN.
Hon. RICHARD TILGHMAN EARLE.
Hon. JOHN JOHNSON.
Hon. WILLIAM BOND MARTIN.
Hon. WALTER DORSEY.
Hon. JOHN STEPHEN.(a).

COURT OF CHANCERY.

Hon. WILLIAM KILTY, Chancellor.

COUNTY COURTS.

FIRST JUDICIAL DISTRICT—*St. Mary's, Charles and Prince-George's Counties.*

Hon. JOHN JOHNSON, Chief Judge.
Hon. EDMUND KEY, Associate Judge.
Hon. JOHN ROUSEY PLATER, do.
Hon. JOHN STEPHEN, Chief Judge.(b).

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen-Anne's and Talbot Counties.*

Hon. RICHARD TILGHMAN EARLE, Chief Judge.
Hon. LEMUEL PURNELL, Associate Judge.
Hon. EDWARD WORRELL, do.
Hon. ROBERT WRIGHT, do.(c).

THIRD JUDICIAL DISTRICT—*Calvert, Anne-Arundel and Montgomery Counties.*

Hon. JEREMIAH TOWNLEY CHASE, Chief Judge.
Hon. RICHARD RIDGELY, Associate Judge.
Hon. CHARLES J. KILGOUR, do.

FOURTH JUDICIAL DISTRICT—*Caroline, Dorchester, Somerset and Worcester Counties.*

Hon. WILLIAM BOND MARTIN, Chief Judge.
Hon. JAMES B. ROBINS, Associate Judge.
Hon. WILLIAM WHITTINGTON, do.

FIFTH JUDICIAL DISTRICT—*Frederick, Washington and Allegany Counties.*

Hon. JOHN BUCHANAN, Chief Judge.
Hon. ABRAHAM SHRIVER, Associate Judge.
Hon. THOMAS BUCHANAN, do.

SIXTH JUDICIAL DISTRICT—*Baltimore and Harford Counties.*

Hon. WALTER DORSEY, Chief Judge.
Hon. CHARLES W. HANSON, Associate Judge.
Hon. WILLIAM H. WARD, do.

BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.
Hon. WILLIAM McMECHEN, Associate Judge.
Hon. ALEXANDER NISBETT, do.

ATTORNEY GENERAL.

LUTHER MARTIN, Esquire.
THOMAS B. DORSEY, Esquire.(d).

ASSISTANT ATTORNEY GENERAL.

NATHANIEL WILLIAMS, Esquire.(e).

(a) Appointed the 20th of December, 1821, to fill the vacancy occasioned by Judge Johnson being appointed Chancellor.

(b) In the place of Ch. J. Johnson, appointed Chancellor.

(c) In the place of Judge Worrell, resigned.

(d) Appointed the 13th of February, 1822.

(e) Appointed the 13th of January, 1820, and to continue in office during the indisposition of the then Attorney-General.

A TABLE

OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

N. B. The letter *v.* follows the name of the Appellant or Plaintiff in error; and the word *and* that of the Appellee or Defendant in error.

* * Those cases, the names of which are printed in *italic*, are taken from MSS, and reported in the Notes, &c.

A.

Abbott's Trustee <i>v.</i> Boggs,	403
Anderson <i>v.</i> The State,	174
Ashcom <i>and</i> Kilgour,	82
Attorney General <i>and</i> Dashiell, et al.	392

B.

Baltimore Insurance Company <i>and</i> Patterson,	417
— & Reister's Town Turnpike <i>and</i> Owings,	84
Baptist, et al. <i>v.</i> De Volunbrun,	86
Barnes <i>v.</i> Gray,	436
Barney <i>v.</i> The Maryland Insurance Company,	139
Barroll & Cannell <i>v.</i> Reading,	175
Batturs <i>v.</i> Sellers & Patterson,	117
Bayard <i>and</i> Beall's Lessee,	127
Beall's Lessee <i>v.</i> Bayard,	127
Blackiston <i>and</i> Morgan,	61
—, et al. <i>and</i> Johns,	430
Boggs <i>and</i> Kennedy,	403
— & Harrison <i>and</i> Mason, et al. Lessee,	480
Boring's Lessee <i>v.</i> Lemmon,	223
Bowie <i>v.</i> O'Neale, et al. Lessee,	226
Boyle's Garnishees <i>and</i> Harding,	478
Brengle <i>and</i> Creager,	234
Brown, et al. Lessee <i>v.</i> Kennedy,	196
— Ex'r. <i>v.</i> Tilden, et ux.	371
Bryan <i>v.</i> M'Elderry,	213
Buchanan, et al. <i>and</i> The State,	317, 500
Burnett & Rigden <i>v.</i> Courts,	78

C.

Cannell & Barroll <i>v.</i> Reading,	175
Carroll, et al. Lessee <i>v.</i> Norwood's heirs,	164
— <i>and</i> Norwood,	155
Caulk <i>and</i> Wicke's Lessee,	36
Chandler <i>v.</i> The State,	284
Chase <i>and</i> The State,	297
Coursey <i>v.</i> Covington,	44
Courts <i>and</i> Burnett & Rigden,	78
Covington <i>and</i> Coursey,	44
Cox's Ex'r. <i>v.</i> Scott,	384
Creager <i>v.</i> Brengle,	234
— <i>and</i> Hagers Town Turnpike Road Company,	122
Culver Ex'r. of Kemp <i>v.</i> Shriner,	218

D.

Dashiell, et al. <i>v.</i> The Attorney General,	392
Davis <i>v.</i> Jacquin & Pomerait,	100
— <i>v.</i> Simpson et al.	147
<i>De Fontaine v De Fontaine,</i>	99
<i>De Volunbrun and Baptiste et al.</i>	86
Diffenderfier's Lesse <i>and</i> Winingder,	181
Donaldson's Lessee <i>and</i> Steuart,	428
<i>Duval v Jones,</i>	253
<i>Duval and Purl's Lessee,</i>	69

E.

Eichelberger <i>v.</i> M'Cauley,	213
----------------------------------	-----

	PAGE.		PAGE.
F.		J.	
Farmers Bank of Maryland and Heighe, et al.	68	Jacquin & Pomerait and Davis, Johns v Stoops, et al.	100 430
— of Somerset & Worcester and Whittington,	489	Jones and Duwall,	253
Fenwick v Forrest,	414	Jones v Slubey,	372
Ferris v Walsh,	306		
Fishwick's adm'r. v Sewell,	211	K.	
Flamer, et al. and Pratt's Lessee,	10	Kelly and Negro William,	59
Fontaine v Fontaine,	99	Kemp's Ex'r. v Shriner,	218
Ford, et al. v Philpot, et al.	312	— Lessee and Foulke, et al.	135
Forrest and Fenwick,	414	Kennedy v Fowke,	63
Foulke, et al. v Kemp's Lessee,	135	— and Browne, et al. Lessee,	196
Fowke and Kennedy,	63	— v Boggs,	403
Frazier and Heighe, et al.	68	Kilgour v Ashcom,	82
—, et al. Lessee v Hall,	437		
Freeman and Wright,	467	L.	
		Law v Scott,	438
G.		Lawrence and Mark,	64
Garrell v Hanna,	412	Lemmon and Boring's Lessee,	223
Gibson, et ux. et al. Lessee v Horton,	177	Long and M-Laughlin,	64
Gilmor, et al. v Coarts,	78	Lowe v Gist,	106
Gist and Lowe,	106	Lusby and Hayes,	485
Goodwin and Hudson,	115		
Gordon v Turner,	369	M.	
Gray and Barnes,	436	McCauley and Eichelberger,	213
		McElderry and Bryan,	213
H.		McLaughlin v Long,	113
Hager's-Town Turnpike Road Com- pany v Creeger,	122	M-Pherson & Brien and Snively,	150
Hall v Mullin,	190	Marine Insurance Company and Pat- terson,	417
— and Frazier, et al. Lessee,	437	Mark v Lawrence,	64
Hammond v Ridgely's, Lessee,	245	Maryland Insurance Company and Barney,	139
Hanna and Garrell,	412	Mason, et al. Lessee v Harrison & Boggs,	480
Harding v Hull & Tyson, Garnishees of Boyle,	478	Maxwell, et al. v Seney's Lessee,	23
Harris v Wilmer,	2	Meagher and Negro Clara,	111
Harris and Wilmer,	1	Mercer v Walmsley,	27
— and Merryman, et al.	423	Merryman, et al. v The State at inst. Harris use Murray,	423
Harrison & Boggs and Mason, et al. Lessee,	480	Morgan v Blackiston,	61
Hayes v Lusby,	485	Morris v Wills,	120
Heighe, et al. v The Farmers Bank of Maryland,	68	Mullin and Hall,	190
Hepburn v Sewell,	211	Murray and Merryman, et al.	423
Hillsborough School, &c. and Dashiell, et al.	392		
Hollingsworth and Yates's Adm'rs.	216	N.	
Horton and Gibson, et ux. et al. Les- see,	177	Negro Clara v Meagher,	111
House v House,	125	— Milley, et al. and Hughes,	310
Howard, et al. v Courts,	78	— Wilham v Kelly,	59
Howell, et al. and Ward,	60	Norwood v Carroll, et al. Lessee,	155
Hudson v Goodwin,	115	— Heirs and The same,	168
Hughes v Negro Milly, et al.	310		
— v Sellers, Adm'r. Rea,	432	O.	
Hull & Tyson, Garnishees of Boyle and Harding,	478	Oakes and Stewart,	107
		O'Neale et al. Lessee and Bowie,	226
		Owings v The Baltimore & Reisters Town Turnpike,	84
		P.	
		Patterson v The Marine Insurance Company,	417

	PAGE.
Patterson v The Baltimore Insurance Company,	417
— & Sellers and Batturs,	117
Pomerait & Jacquin and Davis,	100
Pratt's Lessee v Flamer, et al.	10
— and Walkup,	51
Purl's Lessee, v Duvall,	69

Q.

Queen v The State,	232
--------------------	-----

R.

Rea's Adm'r. and Hughes,	432
Reading and Barroll & Cannell,	175
Ridgely's Lessee and Hammond,	245
Rigden & Burnett v Courts,	78

S.

Saint Peter's School &c. and Dashiell et al.	392
Scott and Cox's Ex'r.	384
— and Law,	438
Seegar's Ex'rs. v. The State use Seney's Adm'r.	488
Sellers Adm'r. Rea and Hughes,	432
— & Patterson and Batturs,	117
Seney's Lessee and Maxwell, et al.	23
— Adm'r. and Seegar's Ex'rs.	488
Sewell and Fishwick's Adm'r.	211
Shivers v Wilson,	130
Shriner and Culver Ex'r. of Kemp,	218
Simpson, et al. and Davis,	147
Slubey and Jones,	372
Smith and Welch,	369
Snaveley v. M-Pherson & Brien,	150
State (The) and Anderson,	174
— v Buchanan, et al.	317, 500
— and Chandler,	284
— v. Chase,	297
— and Queen,	232
— use Smith and Welch,	369
— inst. Harris use Murray and Mer-ryman, et al.	423

	PAGE.
State use Seney's Adm'r. and Seegar's Ex'rs.	488
Stewart v Donaldson's Lessee,	428
Stewart v. Oakes,	107
Stoops, et al. and Johns,	430

T.

Tilden, et ux. and Brown's Ex'r.	371
Turner and Gordon,	369
Turner, et al. v. Worthington, et al.	437
Tyson & Hull, Garnishees of Boyle and Harding,	478

V.

Volunbrun and Baptiste, et al.	86
--------------------------------	----

W.

Walker, et al. Garnishee and Shivers,	130
Walkup v Pratt,	51
Walmsley and Mercer,	27
Walsh and Ferris,	306
Ward v. Howell, et al.	60
Warfield v. Warfield, et al.	459
Welch v. The State use Smith,	369
Whittington v. The Farmers Bank, &c	489
Wickes's Lessee v. Caulk,	36
Wills and Morris,	120
Wilmer v Harris,	1
Wilmer and Harris,	2
Wilson and Shivers,	130
Wininger v. Diffenderffer's Lessee,	181
Woods, et al. and Ford, et al.	312
Worthington, et al. and Turner, et al.	437
Wright v. Freeman,	467

Y.

Yates's Adm'rs. v. Hollingsworth,	216
-----------------------------------	-----



CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

COURT OF APPEALS, (E. S.) JUNE TERM, 1820.

WILMER *vs.* HARRIS.

Wilmer
vs.
Harris.

APPEAL from *Queen-Anne's* county court. This was an action of debt instituted by the appellee against the appellant, on a writing obligatory, executed by *T. Harris, P. Wilmer*, (the appellant,) and *W. Wilmer*, to *E. Harris*, (the appellee,) on the 16th of July, 1810, in the penal sum of \$9000, and reciting that "the said *E. Harris*, having loaned his notes to *H. Wilmer* for the sum above specified, for the purpose of obtaining an accommodation at bank for the said *H. Wilmer's* use; and for the purpose of securing and indemnifying the said *E. Harris* from all and every challenge, claim or demand, which may be brought, exhibited, or prosecuted against him, for or on account of the said accommodation, the said *T. Harris, P. Wilmer* and *W. Wilmer*, have agreed to execute this bond. Now the condition of the within obligation is such, that if the said *T. Harris, P. Wilmer* and *W. Wilmer*, do and shall at all times hereafter save harmless and keep indemnified the said *E. Harris*, his, &c. from all and every challenge,

Where there is a judgment by default in an action on a bond with a collateral condition, there must be breaches suggested, and the damages assessed, as directed by the statute of 8 & 9, *Wm III, ch. 11*, before an execution can issue against the defendant: and if it be sooner issued it will, on motion, be quashed.

If the breaches are stated in the declaration, and there is a judgment for the plaintiff on confession, by *nil dicit*, or on demurrer, they need not be again suggested to enable the jury to assess the damages; nor is such suggestion necessary where the judgment is for the plaintiff on the defendant's demurrer to a replication setting

forth the breaches.

Before the damages in such an action are assessed in the manner before stated, the judgment is only interlocutory.

The act of assembly of 1794, *ch. 46*, does not interfere with the statute of 8 & 9 *Wm. III, ch. 11*.

The admissions of an Executor or Administrator of a co-obligor, are not evidence against the surviving obligor in an action against him by the obligee.

JUNE 1820. claim or demand, which may be brought, exhibited, or prosecuted against him or them, for or on account of his having loaned his notes to the said *Wilmer* for the sum specified within, and from all costs, damages and expenses, he or they may sustain or be put to by reason thereof, then the within obligation to be void," &c. The defendant, on whom a rule was laid to answer the plaintiff's declaration, neglected to plead, and at October term 1813, a judgment was entered against him by default; and on the plaintiff's motion, the court ordered a proceeding in the nature of a writ of inquiry, to be executed at bar, at the succeeding term of the court, to assess the damages. Before the succeeding term, the plaintiff issued a *ca. sa.* on the judgment thus rendered, and the defendant was taken in execution. At the return day of the writ, on motion of the defendant, the execution was *quashed*, and the defendant discharged. The plaintiff appealed to the court of appeals, and the proceedings were transmitted(a). Notwithstanding this

(a) On the appeal here referred to of *Harris vs. Wilmer*, the opinion of the court of appeals, after hearing argument, was delivered at June term 1817, by CHASE, Ch. J. The court are of opinion, that in expounding the statute of 8 & 9 *William III.* such a construction ought to be given to it as will remove the mischief intended to be redressed as to the defendants, and which will advance the remedy of the plaintiffs, for the attainment of justice in the cases specified in the statute. The oppression complained of, as to defendants in suits on bonds or instruments, with collateral conditions, was, that a judgment was obtained by the plaintiff for the penalty, which greatly exceeded the damages sustained by the plaintiff by the breach of the covenant, and the defendant was compelled to go into chancery to restrain the plaintiff's execution to the damages actually sustained. The plaintiff's remedy was advanced, by permitting him to assign as many breaches of the covenants as the justice of his case might require. The statute cannot be considered as giving an additional remedy to the plaintiff in the cases embraced by it—because such exposition would frustrate the intention of the makers, and defeat the principal object of it—the relieving the defendant from the oppression of being forced into chancery to obtain a liquidation of the damages really sustained; but was intended to restrict the plaintiff to the remedy prescribed by it, whereby justice would be done to both parties more speedily and at less expense. In the opinion of the court, the statute is not confined to bonds where the condition is for the performance of covenants in another instrument; for certainly there is no difference whether the agreement is inserted *verbatim* in the condition, or incorporated by reference to another instrument. In either case the condition is an agreement in writing. The statute having been made for the protection of the defendant as well as for the advancement of the remedy of the plaintiff, to prevent the defendant's being oppressed by the plaintiff's rigorously exacting the penalty, and forcing him into chancery, the words "may assign" have been construed imperatively, *shall assign*, and "may suggest" *shall suggest*; and this to effectuate the intention of the makers, and to prevent the oppression complained of. Without doubt the statute embraces the present

appeal, the record states, that the plaintiff and defendant JUNE 1820. appeared in court, and that the cause was continued from term to term until May term 1819, when a jury was empannelled to assess the damages, and an inquisition returned by them assessing the damages sustained by the plaintiff to \$9530 05.

Wilmer
vs.
Harris.

1. At executing the inquiry at bar, the plaintiff produced a witness, who proved that he became discount clerk for the *Union Bank of Maryland* in March 1810, and that he had been discount clerk ever since. He also offered to prove by the same witness, that he, the plaintiff, had paid six notes at said bank as they became due, viz. one note dated the 31st of December 1810, for \$1000; another dated the 28th of January 1811, for \$2000; another dated the 31st of January 1811, for \$1500; another dated the 4th of February 1811, for \$1500; another dated the 14th of February 1811, for \$1000; and another dated the 21st of February 1811, for \$1000, each drawn by the plaintiff, and payable 60 days after date to *H. Wilmer*, or order. He further offered to prove, that these notes were given to relieve notes which were drawn by him and endorsed by *H. Wilmer*, to relieve other notes of the same amount. The last mentioned notes were not produced, and no legal account given of them. The defendant objected to this last evidence being given, and the court sustained the objection. The plaintiff then, to charge the defendant, and to ascertain his damages, offered to read in evidence the record of a judgment rendered in *Queen-Anne's* county court, by the confession of *W. Harris*, surviving executor of *T. Harris*, in an action brought originally against his testator, and to which, as his executor, he appeared after his death, by the present plaintiff, on the same writing obligatory upon which this action was brought, and such proceedings were had therein, that in May 1816, a judgment was rendered

bond, because the condition contains an agreement that the defendant shall indemnify and save harmless the plaintiff by his lending his name to procure money for the defendant from some of the banks. The damages are uncertain and must be ascertained by the verdict of a jury, if they cannot be adjusted by the parties. The plaintiff in this cause has obtained a judgment by default for the penalty of the bond, and an order of the court below for a writ of inquiry. The court are of opinion, that the plaintiff is confined to his remedy prescribed by the statute, and could not legally proceed at common law on his judgment, and think the court below did right in quashing the execution

JUDGMENT AFFIRMED.

JUNE 1820

Wilmer
vs.
Harris.

by default, and an inquiry ordered at bar at the succeeding term, when *W. Harris*, the executor, confessed judgment for the penalty of the bond and costs; to be released on payment of \$9000, with interest from the 7th of March 1811, until paid, and costs, with an agreement that payments should be allowed as per statement filed. The plaintiff also offered in evidence a letter from *W. Harris*, which was admitted to be his hand writing, to his attorney, dated the 28th of October 1816, requesting him "to give a final judgment in the case of *E. Harris* against *W. Harris*, executor of *T. Harris*, agreeable to the credits rendered in an account sent"—and offered the account referred to in the letter, admitted to be in the hand writing of the plaintiff, being the amount of credits taken from his book on account of *H. Wilmer*, amounting to \$3439 56, which he proved were filed by him, and the counsel for *W. Harris*, at the time of the rendition of the judgment. It was admitted that *W. Harris*, mentioned in the record so offered in evidence, is the son and surviving executor of *T. Harris*, the co-obligor in the bond upon which this action was instituted. The defendant then objected to the record of the judgment, the letter and account offered in evidence, as aforesaid, going to the jury. But the court, [*Earle*, Ch. J. and *Purnell*, A. J.] overruled the objection, and permitted the evidence to be given. The defendant excepted.

2. The defendant then produced *W. Harris*, the surviving executor of *T. Harris*, who being sworn with the consent of the parties, proved that at May term 1816, he attended *Queen-Anne's* county for the trial of the cause which was then pending against him as executor of his father, *T. Harris*, by *E. Harris*; that no proposition was made to him during that term by the plaintiff to confess a final judgment. That he also attended court at October term 1816, for the trial of the cause; that the plaintiff frequently talked to him about settling it, and during that term proposed to him to give him a final judgment, agreeing to give the credits mentioned in the account before referred to. That the plaintiff told him he would receive from him one half of the balance, after deducting the account from the amount of his claim; that he would continue to prosecute his claim for the whole sum against *P. Wilmer*, and upon the recovery of the whole sum, he would pay back

to him, the witness, the amount which the witness should JUNE 1820.
 pay him; and he believed he should be able to recover the
 whole sum of *P. Wilmer*. At that time the plaintiff talk-
 ed to the witness about the suit which he had against the
 witness, and also the suit which he had against *P. Wilmer*;
 and the plaintiff told the witness, that if he confessed judg-
 ment, he would bring the business sooner to a close, and
 that the witness would be able to settle his father's estate
 sooner, which the witness told the plaintiff he was anxious
 to do. That his father died in October 1813; that *H. Wil-*
mer married the sister of the witness, and was a commis-
 sion merchant and grocer in *Baltimore*. That he heard his
 father several times, after the failure of *H. Wilmer*, which
 happened in 1811, say, that he supposed he should have
 his proportion of the money to pay, and alleged that *P.*
Wilmer had been made safe. His father also said, that he
 had heard from *J. B.* deceased, that he had seen goods in
Philadelphia in the name of *H. Wilmer*, and that he had
 traced them to *Centreville* in the possession of *P. Wilmer*.
 All this was said by his father after the suits were brought
 against him and *P. Wilmer* by the plaintiff. That he heard
 the plaintiff say, after the suits were brought, that he had
 reason to believe that *P. Wilmer* had funds of *H. Wilmer*
 in his hands. The defendant then prayed the opinion of
 the court, and their direction to the jury, that if they should
 believe that it was intended by the confession of the judg-
 ment by *W. Harris*, as before mentioned, to charge *P.*
Wilmer, (the defendant,) with the amount of the whole ba-
 lance, after deducting the account referred to, and that *W.*
Harris was influenced to confess the judgment from such
 an expectation, such confession ought not to charge the de-
 fendant in this cause with the damages claimed. Which
 direction the court refused to give; but was of opinion, and
 so instructed the jury, that the admissions flowing from the
 letter of *W. Harris* to his counsel, and the judgment con-
 fessed by him to the plaintiff, ought to have no weight with
 the jury, if the jury should believe, from the testimony laid
 before them, that the letter was written, and the judgment
 confessed, with a view to furnish the plaintiff with evi-
 dence to be used to the prejudice of the defendant in the
 trial of this cause. The defendant excepted.

3. The plaintiff then prayed the court to direct the jury,
 that if they believed, from the evidence, that at the time of

Wilmer
 vs.
 Harris.

JUNE 1820. the settlement between the plaintiff and *W. Harris*, that the parties adjusted the account according to the balance which they believed to be due, and that the judgment was given for that balance, without an intention or knowledge on the part of either of them, that their proceedings would in any shape affect the decision of this cause, that the circumstance is no evidence of fraud, although it might have been agreed at the same time, that if a judgment should be rendered against the present defendant, the whole debt should be levied against him. The court gave the direction. The defendant excepted; and judgment being rendered on the inquisition of the jury for the sum assessed by them, and costs, the defendant appealed to this court.

Wilmer
vs.
Harris.

The cause was argued before **BUCHANAN, JOHNSON and DORSEY, J.** by

Hammond, Carmichael and Gale, for the appellant, and by

Bullitt, Chambers and Harrison, for the appellee.

The opinion of the court was delivered by

DORSEY, J. This was an action of debt brought on a bond executed by the defendant, and *Thomas Harris* and *William Wilmer*. The bond, after reciting that the plaintiff had loaned to a certain *Henry Wilmer* certain promissory notes, to be discounted at bank, for the use of the said *Henry Wilmer*, proceeds as follows: "Now the condition of the above obligation is such, that if the obligors shall at all times save harmless, and keep indemnified, the said *Edward Harris*, his heirs, executors and administrators, from all and every claim which may be brought, exhibited, or prosecuted against him or them, for or on account of his having loaned his notes to the said *Wilmer*, and from all costs, damages and expenses, he or they may sustain, or be put to by reason thereof," &c. At October term 1813, a judgment by default was entered against the defendant for want of a plea, and the court at the same term made an order, that a proceeding, in nature of a writ of inquiry, be executed at the succeeding term, to assess the damages. The plaintiff issued a *ca. sa.* on this interlocutory judgment, returnable to the next succeeding May term, and the defendant was discharged by the court, on the ground that the execution had erroneously issued. The plaintiff thereupon prayed an appeal from such decision to the court of

appeals, and the court ordered a transcript of the proceed- JUNE 1820.
 ings to be transmitted to the court of appeals, which was
 accordingly done. The record then proceeds to state the
 appearances of the plaintiff and defendant, and the conti-
 nuance of the case by their consent at all the succeeding
 terms of the county court, until the third Monday of *May*
 1818, on which day the appearances of the plaintiff and
 the defendant are both recorded, and the cause then conti-
 nued by the court on the affidavit of the plaintiff, stating
 the absence of a material witness, until the ensuing *Octo-*
ber term. At which term the appearances of the plaintiff
 and defendant are recorded, and the cause further conti-
 nued by the court, on a similar affidavit, to the succeeding
May term, when the plaintiff and defendant appear, and a
 jury are empannelled to assess the damages, who return
 their inquisition, by which they find that the plaintiff has
 sustained damages to the amount of \$9530 05, and a judg-
 ment was thereupon rendered for that sum, and costs.

Wilmer
 vs.
 Harris.

Such is the state of the record, unconnected with the
 bills of exceptions, tendered by the defendant upon the trial
 before the jury of inquiry.

It cannot be controverted, that if it appears from the
 record that the jury could not legally assess the da-
 mages, the judgment must be reversed, because a
 judgment by default, for want of a plea on a bond with a
 collateral condition, is only an interlocutory judgment, and
 a final judgment can only be rendered when the damages
 sustained by the plaintiff by the nonperformance of the
 agreement, contained in the bond, are legally ascertained.

Before the statute of 8 & 9 *William III*, chap. 11, s. 8,
 the plaintiff in an action on a bond with a collateral condi-
 tion would, upon an issue being found in his favour, or on
 judgment by *nil dicit* or on demurrer, have been entitled to
 a judgment for the penalty and costs, and might have tak-
 en out an execution for the whole, without any regard to
 the damage which he had actually sustained by breach of
 the covenants; but the statute declares, that the plaintiff
 may assign as many breaches as he shall think fit, and the
 jury shall assess the damages for such of the breaches as
 the plaintiff, upon the trial of the issues, shall prove to have
 been broken, and if judgment shall be given for the plain-
 tiff upon demurrer, confession, or *nil dicit*, the plaintiff may
 suggest on the roll as many breaches as he shall think fit,

JUNE 1820. upon which a writ shall issue to the sheriff of the county where the action is brought, to summon a jury to inquire of the truth of those breaches, and to assess the damages. *Where the declaration sets forth the condition of the bond, and proceeds to assign the breaches, and there is a judgment for the plaintiff on demurrer, nil dicit or confession, new breaches need not be suggested on the roll, because the declaration having assigned the breaches, it would be idle to suggest the same breaches again: so, if there is a judgment for the plaintiff on a demurrer to his replication, which sets forth breaches, a new suggestion of breaches on the roll would be unnecessary; and although the statute uses the words "may assign" and "may suggest," the courts have decided those words are compulsory on the plaintiff.*

Wilmer
vs.
Harris.

The following authorities are referred to in support of the above propositions:—2 *Richardson's Practice in the Common Pleas*, 285, (2d edition)—1 *Saunders' Rep.* 58, (*Note* 1.) 5 *T. Rep.* 636, 538. 2 *Wilson*, 377. And the statute extends, as well to bonds with conditions thereunder written for the performance of any thing contained therein, as to covenants and agreements contained in another indenture, deed or writing. *Collins vs. Collins*, 2 *Burr.* 824, 826; and *Harris vs. Wilmer*, in this court, at June term 1817, (*ante* 2, *Note*.)

It has been urged by the appellee's counsel, that the act of 1794, *ch.* 46, has dispensed with the necessity of making suggestions on the roll, in the manner prescribed by the statute 8 & 9 *William*. Before the passage of the act of assembly above referred to, writs of inquiry were generally executed before the sheriff, and the design of the legislature, in passing the act, was to transfer to the county courts this power, and that the parties should be entitled to call on the court for their opinion, on questions of law arising in the case, in the same manner as if a jury had been empannelled to try an issue in fact. This law being remedial and made for the advancement of justice by substituting a superior jurisdiction in the place of an inferior one, cannot, under any sound rule of interpretation, be construed to repeal any of the provisions of the *British* statute, relating to the suggestion of breaches. Let it be remembered, that the statute provides, that after breaches shall have been assigned or suggested, the judgment en-

tered shall remain as a security for any further breaches of JUNE 1820.
 covenant contained in the said deed, instrument or writ-
 ing, and that the plaintiff may have a *scire facias* on the
 said judgment against the defendant, his heirs, executors
 and administrators, suggesting breaches of the covenants,
 and may summon them to shew cause why execution should
 not be awarded on the said judgment, upon which there
 shall be the like proceedings as were originally had in the
 action on the bond.

Wilmer
 vs.
 Harris.

Unless a suggestion is made on the roll, how can it be known that the breaches assigned in the *scire facias* are the same or different from those on which the judgment was rendered? The object of the statute, in requiring the suggestions, was to give certainty to the proceedings under it, but the effect ascribed to the act of 1794, *ch.* 46, by the counsel for the appellee, would destroy this legal certainty, when no possible reason can be suggested for such an intention on the part of the legislature.

The final judgment of the court below being erroneous on this ground, it becomes unnecessary to express an opinion on the other points raised by the appellant's counsel.

In relation to the bills of exceptions taken by the defendant's counsel, the court are of opinion, that the county court erred in each opinion expressed on those exceptions.

The court hold, that the admission of an executor or administrator of a co-obligor, cannot be used in evidence against the surviving obligor in a suit brought against him by the obligee, and of course, that a judgment confessed by such executor or administrator, (being nothing more than an admission,) is equally inadmissible. If the admissions of an obligor could be used as evidence against a co-obligor, (and whether they could, or not, the court do not mean to decide,) yet it does not follow that the confessions of an executor or administrator are equally admissible. The privity between the executor or administrator, and co-obligor, is not the same as that between the co-obligors, and it cannot be supposed that the executor or administrator has the same information on the subject as his testator or intestate had. No case has been cited in support of the admissibility of such testimony, and various considerations of policy and justice are opposed to it. The court below therefore erred in permitting the judgment confessed by

JUNE 1820. *William Harris*, the account of the plaintiff, and the letter of *William Harris*, to go before the jury.

Pratt
vs.
Flamer.

It necessarily follows from this view of the case, that the opinion of the county court, as expressed in the *second* bill of exceptions, is erroneous, because in their direction to the jury they declare, that the admissions flowing from the letter of *William Harris* to his counsel, and the judgment confessed by him to *Edward Harris*, ought to have no weight with them, if they believe from the testimony laid before them that the letter was written, and the judgment confessed, with a view to furnish *Edward Harris* with evidence to be used to the prejudice of the defendant in the trial of this cause; thus giving to the plaintiff the full benefit of those documents as testimony, except in the particular case stated by the court, when in point of law such judgment and letter were not legal and admissible in any way to charge the defendant.

And this view is equally fatal to the opinion delivered in the *third* bill of exceptions; because the court therein recognize the settlement between the plaintiff and *William Harris*, and the judgment against *William Harris*, as evidence in the cause, by declaring its legal effect in a specified case, when in point of law they ought to have rejected the prayer, as not being founded on testimony which was legal and admissible.

The court therefore reverse the judgment of the county court, this court dissenting from the opinions expressed in all the bills of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

COURT OF APPEALS, (E. S.) JUNE TERM, 1820.

PRATT'S LESSEE vs. FLAMER, et al.

APPEAL from Tulbot County Court. Ejectment for three tracts of land, viz. Piccadilly, Vickar's Venture, and

A devise to F. and her heirs lawfully begotten, and in case she dies without heirs, remainder over, gives F. only an estate tail.

A devise to F. for life, remainder over to her issue, and in case the issue dies without heirs, remainder over to B, the issue takes only an estate for life—the words *without heirs*, preceding the last remainder, meaning *heirs of the body only*, and not being sufficient to enlarge the interest of the first remainderman into a fee simple.

A devise to an unborn illegitimate child, where the mother is described, is valid.

Devises to two illegitimate children, and in case either shall die without heirs, then her part shall go to the survivor,—the word *heirs* means *issue*, and not heirs generally.

Dunn's Range. The questions submitted to the court by JUNE 1820. the statement of facts, arose under the following devises in the will of *William Vickars*, dated the 26th of August 1774, viz. "I give, devise and bequeath, unto my loving wife *Sarah Vickars*, my home plantation called *Piccadilly*, and part of *Dunn's Range*, during her life." "I give and bequeath unto my loving wife *Sarah Vickars*, five negroes, viz. &c. during her life, and after her decease, the aforesaid lands and negroes to go to my daughter *Elizabeth Vickars*." "I give, devise and bequeath, unto my daughter *Elizabeth Vickars*, my plantation called *Vickars' Venture*, to her and her heirs (lawfully begotten) for ever; and in case she dies without heirs, to return to my loving wife *Sarah Vickars*." "I give and bequeath to my daughter *Elizabeth Vickars*, four negroes, viz. &c. to her and her heirs for ever; and in case she dies without heirs, to return to my loving wife *Sarah Vickars*." "In case there should be any issue in nine months from this date, I give and bequeath my home plantation aforesaid called *Piccadilly*, and part of *Dunn's Range*, after the decease of my loving wife *Sarah Vickars*, to the said issue. "In case my children die without heirs, I give and bequeath my aforesaid lands and negroes unto my brother *Jacob Garron*, (after the decease of my loving wife *Sarah Vickars*) to him and his heirs for ever." It was admitted that *Sarah*, the wife of the testator, survived him, and died in 1801, and that she had no issue except her daughter *Elizabeth*, who was the only child of the testator; that *Elizabeth* also survived her father, intermarried with *Charles Price*, and died in 1789, in the life-time of her mother. That *Jacob Garron* also survived the testator, and on the 2d of April, 1783, duly made and executed his will, whereby he devised to his daughter *Henrietta Palmer*, daughter of *Rebecca Palmer*, the one half of his estate, of whatever it might consist, after his just debts were paid; and the other half to the child that *Rebecca Palmer* was then big with, if it should live, and if it should die without heir, then he devised it unto the said *Henrietta Palmer*, her and her heirs for ever; if either of the children should die without heir, then he devised their part to the other. It was also admitted that *Henrietta Palmer* survived the last mentioned testator, and died in 1801, before she attained the age of 21 years, and without issue. That at the time when *Garron* made his will, *Rebecca Palmer* was ensient of and with a female child, who was

Pratt
vs.
Flamer.

JUNE 1820. born soon after the decease of *Garron*, and named *Ann*, and that she was born long before the death of *Henrietta*, and intermarried with *Philemon Pratt*, which said *Philemon*, together with the said *Ann*, made the demise set forth in the declaration, and that the said *Ann* is the surviving lessor of the plaintiff. It was also admitted that the said *Henrietta* and *Ann* were illegitimate children, the daughters of *Rebecca Palmer* by *Garron*, and that *Garron* was the half brother of *William Vickars*, both born of the same mother, but of different fathers. The county court gave judgment on the case stated for the defendants, and the plaintiff appealed to this court.

Pratt
vs.
Flamer.

The cause was argued in this court before CHASE, Ch. J. BUCHANAN, JOHNSON, MARTIN and DORSEY, J.

Kerr, for the appellant, contended that *Elizabeth Vickars* took an estate tail. *Co. Litt.* 3 *Salk.* 336. 4 *Bac. Ab.* 256. 7 *Co.* 41. *Moore*.—A devise to an unborn infant is valid, and will take effect when the child is born. 4 *Bac. Ab.* 246. *Pow. on Dev.* 328. *Elizabeth Vickars* and the issue, if any, took cross remainders in tail. Where a devisee takes an express estate tail, it is not to be enlarged by implication. 4 *Bac. Ab.* 290. And as the estate tail could not be enlarged by implication, they therefore took cross remainders in tail. The word *heirs* in the will must mean *heirs of his body*. 4 *Bac. Ab.* 259. *Wille's Rep.* 165, 369, 370. *Elizabeth Vickars*, and the issue, took cross remainders in tail by implication. 2 *Blk. Com.* 381. 4 *Bac. Ab.* 290. 2 *East* 36, 1 *Saund.* 105, (*Note* 6).

On the death of *W. Vickars*, *Garron* had an estate in remainder in fee, after the estates tail. If *Garron* had an interest it was devisable by him. A devise to an illegitimate child unborn, is valid if the mother be described. *Co. Litt.* 3. b. 1. *P. Wms.* 2 *Roll. Ab.* 43, 44. *Moore*, 430. By the word *heirs*, *Garron* meant heirs of the body; for being illegitimate they could have no heirs except issue of the body, and therefore the remainder over is valid. If an alien be made a denison, and his heirs remainder over, this is an estate tail, because he would have no heirs except of his body. 3 *Buls.* 193, 195. The same words are not necessary in a will as in a deed. The intention is to govern. 3 *T. R.* 135, 136. *Cowp.* 410.

Hammond for the appellees. The intention of a testa- JUNE 1820.
 tor must prevail, if consistent with the rules of law. It
 was the intention of *W. Vickars* to give the personal estate
 in the same manner as the real, but the remainder over is
 void, as too remote. The inheritance would have gone to
Elizabeth as the heir at law. Cross remainders are only
 where the estate is given in tail. 2 *Blk. Com.* 381. There
 can be no cross remainders except in estates tail. More
 than two cannot take cross remainders, except the intenti-
 on is plain and manifest. The land called *Piccadilly* was
 unquestionably given to *Elizabeth* in fee, to be defeated
 on the birth of the issue; but as there was no issue born,
 the fee remained. She also took a fee in *Vickars' Ven-*
ture. *Bacon* in his abridgment says, a devise to A and his
 heirs lawfully begotten, is an estate in fee tail. He refers
 to *Moore's Reports*, which do not support the position. In
 the case in *Moore* the entail was created by the words if
she die without fruit of her body. The words lawfully be-
 gotten, are no more than would be implied; for none can
 be heir except lawfully begotten. 2 *Ld. Raym.* 1145. As
 to what words create an estate tail by grant. *Co. Litt.* 20, b.
 It is essentially necessary, in order to create an estate
 by will, that words should be inserted confining the heirs
 to some body. 2 *Ld. Raym.* 1145. The words "to him
 and his heirs lawfully begotten for ever," were adjudged
 an estate in fee. 1 *Harr. & M'Hen.* 336. If an estate
 in fee was vested in *Elizabeth Vickars*, can the limitation
 over, change the nature of the estate? In every instance
 where lands are devised in fee, and if the devisee dies
 without heirs, the deviser means by the word *heirs*, issue.
 Such is the intention, whether the remainder over be to a
 connexion of the first devisee, or to a stranger. A devise
 over, after a fee, is void. *Cowp.* 234. If the limitation
 over, after an estate in fee is given, is to a stranger, it is
 void; but if to one who could be heir to the devisee, it is
 valid. The first devisee's estate is reduced to an estate
 tail. 1 *Ves.* 89. Could *Garron* claim unless there had
 been issue born within 9 months, and such issue had died
 without heirs? Both contingencies must happen. A stranger
 never can take a remainder after a dying without *heirs*. That
 word is never construed *issue*, except where the remainder
 man was capable of inheriting. An express devise in tail
 is not to be enlarged by implication. Under the will of

Pratt
 vs.
 Flamer.

JUNE 1820. *Garron* it is admitted that *Henrietta* took an estate in fee in one half. But the devise to an unborn illegitimate child is void. If it was valid as to the portion devised to her, yet she was not entitled to the portion devised to her sister. Originally a devise to a person *in ventre* was void. *Pow. on Dev.* 320. The authorities to prove that an unborn illegitimate child cannot take as devisee, are *Cro. Eliz.* 509. 1 *P. Wms.* 530. *Pow. on Dev.* 339. *Fern.* 175, 176. 2 *Blk.* 170. If the unborn child could not take the part devised to her, neither can she take the part devised to her sister. As the half devised to *Henrietta* was in fee, the remainder over on her death without *heirs* is void as being too remote. If a fee can be given to a bastard, then a limitation over *must be void*. It is the same as to a *denison*. A grant to a bastard and *his heirs*, and if he dies without heirs, remainder over is void, although the bastard could have no heir except issue. 2 *Ld. Raym.* 1152. If she died without *heir*, is the same as without *heirs*. *Pow. on Dev.* 426. 4 *Com. Dig.* 216.

Pratt
vs.
Flamer.

Bullitt, in reply. It is certain that *W. Vickars* designed that the property, on certain events occurring, should go to *Garron*. He intended to entail it on *Elizabeth*—remainder to his wife for life—remainder to *Garron*. A fee tail only passed. The words *lawfully begotten forever*, must pass a *fee tail*. The word *heir*, in that part of the will, must mean *issue*, for the testator never intended a total failure of heirs. He knew the difference between a *fee tail* and a *fee simple*. To *Garron* a clear *fee simple* is given. 3 *Com. Dig.* 26. *Co. Litt.* 20. b. Although in the case cited from *Moore* there were other words in the will, besides the words *lawfully begotten*, sufficient to pass the *fee tail*, yet the opinion of the court is formed as well on those words as on the others. If they had any effect they were sufficient to pass the estate tail. The case in 2 *Ld. Raym.* 1152, is of a deed, and not a will. In 2 *Harr. & M-Hen.* 336, there is no limitation over after the words *lawfully begotten*. The cases cited in favour of a fee's passing were cases of grants, and it was relied on that there was *no limitation over*. If *Vickars' Venture* was devised in tail, then that estate is not enlarged by the subsequent words on which the remainder over to *Garron* is made to depend. In case she dies without *heirs*, means such heirs as were before described; that is, heirs of the body. It is

admitted that the subsequent words by implication cannot enlarge the estate. If the estate tail is not enlarged by the words "*in case my children die without heirs*," then it must necessarily follow, that the remainder over is valid; for it is not a remainder after a fee, but after an estate tail. The devise *to the issue*, was only an estate for life, except the subsequent words operate, and they can only operate to give an estate tail. *Piccadilly* was only given to the *unborn issue*, (if such issue had come into existence,) for life, except the estate is enlarged by the subsequent words. If the child was not born, then *Elizabeth* was to have *Piccadilly* in the same manner as she was to have *Vickers' Venture*. But the words used by which the estate was given were sufficient only to pass an estate for life, except it is enlarged by the subsequent words; and if enlarged by them, then an estate tail passed; if not, the remainder over to *Garron* was after estates for lives were given, and therefore valid. When an intermediate estate is intended to take effect by the birth of a child, if the child is not born, the remainder takes an immediate effect. 1 *Willes' Rep.* 105. *Cowp.* 40. *Fern.* 163, 164. If a child had been born, it with *Elizabeth* took cross remainders in fee tail. If *Elizabeth* took an estate in fee, then the limitation over may be supported as an executory devise—as if they died without heirs, living the mother. They died during the life of the mother. What passed under *Garron's* will? *Henrietta Palmer* took one half of the estate. The other half he gives to the child that *Rebecca Palmer* was then big with. It is contended that the devise is void by the policy of the law. The devise is *valid*; for it is given, and the description is only the child that *Rebecca Palmer* was then pregnant with—not as his child. Limitation to an unborn bastard is good, if described with certainty. *Roll. Ab. Noy*, 35. In *Cro. Eliz.* there was no decision on the subject. The judges differed in opinion, and it is said by *Fenner*, that upon a consultation with the other judges, the majority were favourable to the bastard. In 1 *P. Wms.* 530, it was decided, that the after born children could not take, and because they had not got by reputation to be thought the children of the testator's son. The remainder over to the unborn child it is said is void, being a fee on a fee. If the children had been legitimate then they would have taken estates tail; for neither could die without heir,

JUNE 1820.

Pratt
vs.
Flumer

JUNE 1820. *Pratt vs. Flamer.* living the other sister—As they were illegitimate, there could be no heir except they had issue. A gift to a bastard, and his heirs, is a fee. 2 *Ld. Raym.* 1152. This was not a will. *Cur. Adv. Vult.*

JOHNSON, J. at this term, delivered the opinion of the Court.

This was an action of ejectment brought to recover three tracts of land, to wit, *Piccadilly, Vickars' Venture, and Dunn's Range*; the cause was tried on a case stated, and judgment given in favour of the defendant.

The case stated in substance is, that *William Vickars* being seized in fee of two of the tracts, *Piccadilly* and *Vickars' Venture*, on the 27th of August 1774, in due form of law made his last will and testament, in which are the following clauses:

1st. "I give and bequeath to my loving wife *Sarah Vickars*, my home plantation called *Piccadilly*, during her life."

2d. And by the next clause he gave her five negroes by name, also during life, and after her death the negroes and land to go "to my daughter *Elizabeth Vickars*."

3d. "Item. I give and bequeath unto my daughter *Elizabeth Vickars*, my plantation called *Vickars' Venture*, to her and her heirs, (lawfully begotten,) for ever; and in case she dies without heirs, to return to my wife *Sarah Vickars*."

4th. And by the next clause he gave to his said daughter four negroes by name, to her and her heirs for ever, "in case she dies without heirs to return to my wife *Sarah*."

5th. "Item. In case there should be any issue in nine months from this date, I give and bequeath my home plantation aforesaid called *Piccadilly*," (and the five negroes first given to his wife,) "after the decease of my loving wife *Sarah Vickars*, to the said issue."

6th. Item. In case my children die without heirs, I give and bequeath my aforesaid lands and negroes, unto my brother *Jacob Garron*, (after the decease of my loving wife *Sarah Vickars*,) to him and his heirs for ever."

That shortly after the execution of the will, the testator died; *Elizabeth Vickars* intermarried with *Charles Price*, and died in 1789, without issue. *Sarah*, the mother, died in 1801 without having another child born after the date of the will.

Jacob Garron, the brother of *Wm. Vickars*, survived *June 1820*. him, and died on the 2d of April 1783, having first in due form made and executed his last will and testament, the material parts of which are—"I give and bequeath unto my daughter *Henrietta Palmer*, daughter of *Rebecca Palmer*, the one half of my estate of whatever it may consist in, after my just debts are paid."

Pratt
vs.
Flamer.

"Item. I give and bequeath the other half of my estate unto the child *Rebecca Palmer is now big with*, if it lives, and if it should die without *heir*, then I give and bequeath it unto the said *Henrietta*, her and her heirs for ever; if either of the children die without *heir*, then I give and bequeath their part to the other." *Henrietta* survived the testator, and died about the year 1801, a minor, and without issue. *Rebecca Palmer*, at the time the will of *Garron* was made, was pregnant with a daughter, who was born soon after the decease of *Jacob Garron*, and her name was *Ann*, who intermarried with *Philemon Pratt*, by whom, in conjunction with his wife, the present ejectment was brought.

Several questions are made under these wills: The first is, that *Jacob Garron* took no interest under the will of *Vickars*.

Second. If any interest passed to him, it was confined to *Vickars' Venture*, and did not extend to *Piccadilly*.

And supposing that an estate was vested in the whole real property of *W. Vickars* in *Jacob Garron*; yet first, that the after born child of *Rebecca Palmer* being illegitimate took nothing by the first devise to her—and secondly, if she was entitled to the one half of the estate, yet that the remainder over to her of *Henrietta's* part was void.

From the state of the case, and from the will of *William Vickars*, it is most evident what was the testator's design. He had a wife, one child, and the probability of having a child born after his decease, these were the persons he intended to provide for, and that accomplished, his brother was the next person that engaged his attention. He appears from the will to have understood the nature of the different estates he designed to carve out: a life estate, an estate tail, and a fee simple; and such his intention will be carried into effect, if it can be done consistent with the rules of law, if not it must yield to them.

By the first and second clauses of the will, the real and personal property devised to his wife for life, on her death

JUNE 1820. is to go to her daughter *Elizabeth*, without expressing the extent of the interest given to *Elizabeth*.

Pratt
vs.
Flamer.

By the third clause the real property, that is *Vickars' Venture*, is given to *Elizabeth* and her heirs, (*lawfully begotten*,) for ever. And by the fourth clause the negroes are given to her and her heirs for ever.

It will be observed, that the only clause in the will, in which the words "lawfully begotten" are inserted, is the one that gives *Vickars' Venture* to *Elizabeth*; these words are not to be rejected in the construction of the will, if they are calculated to elucidate the intention, and to make that intention consistent with the principles of law; and if the effect of those words is to turn the estate that was given into a fee tail, which would be a fee simple without their aid, and thereby give effect to the ulterior clauses that otherwise would be void, certainly that interpretation must be given to them that will make all the parts of the will effectual *ut res magis valeat quam pereat*.

From the elaborate argument this case underwent, all the light that could have been, has been cast on the subject, and after the most industrious researches, no case has been found, where the words in a will "lawfully begotten," with a limitation over, has been construed a fee simple. Few cases exist on the subject, and although in the case reported in *Moore's Reports*, cited in the argument, there were other words that were calculated to create an estate tail, yet the words *lawfully begotten*, were relied on as forming a part of the foundation on which it was determined the estate in question was entail.

In *Comyn's Digest*, and by *Hargrave* in his notes on *Coke Littleton*, those words, *lawfully begotten*, in a will, are sufficient to pass an estate tail. No case from the *English* authorities has been produced, where those words in a will, where no remainder over was given, have been adjudged to pass a fee simple; and it may be sufficient to say, that in the case cited from 1 *Harris and M'Henry* 336, there was no limitation over, and therefore that case is not like the one under consideration. The limitation over is of important consideration, for every part of the will must be taken together, and the construction formed from all its parts, so as to give effect to the whole, unless some principle of law is thereby violated; but if *Elizabeth Vickars* takes an estate tail in *Vickars' Venture*, then, the limitation

in fee to *Jacob Garron*, is valid, and such, in the opinion JUNE 1820.
of the court, is the true interpretation of the will.

By the will, *Piccadilly* is devised to the wife for life, and on her death to *Elizabeth*, but in case the contemplated child had been born, *Piccadilly*, on the death of the mother, was to go to such child. As then no estate of inheritance was given in *Piccadilly*, the devisees, as such, took only estates for life, unless that interest was enlarged by the subsequent parts of the will. No matter in whom the inheritance existed, they, as devisees, were not entitled to it, unless the estates for lives were enlarged into a fee simple, and if so, as the remainder to *Garron* was to take effect, after the failure of the heirs, it is too remote, and therefore void. We have seen that all the devisees, as such, took only estates for life, in *Piccadilly*, under those clauses of the will purporting to dispose of that tract. Do the words in the will, describing the event on which *Garron* was to take, so enlarge their estates as to defeat the interest intended to be given to him?

“In case my children die without heirs, then I give and bequeath my aforesaid lands and negroes to *Jacob Garron*, to him and his heirs for ever.”

Are those words necessarily to be understood as meaning heirs general, or may they not be confined to heirs, proceeding from the persons of the devisees, and be construed issue? That the word *heirs* will not always apply to heirs generally is most certain, frequent are the instances of that word being confined to mean issue; and it is impossible to read carefully the will in question to doubt, but by that word, in the clause restricting the land from passing from his children, he meant issue; for in the preceding clauses of the will, whenever he points out the event on which he designed the property to go from his children, in whom an estate of inheritance was intended to be given, he uses the same expression.

Thus in the clause in which *Vickars' Venture* is given to *Elizabeth*, and to her heirs, (lawfully begotten,) if she die without heirs; what heirs? heirs lawfully begotten, that is issue; and an estate tail is created by those words.

As then the words (lawfully begotten,) confine the meaning of the word heirs in a will to issue, especially when there is a limitation over, and as the words die without heirs, must, in that clause of the will by which *Vickars'*

Pratt
vs.
Flamer.

JUNE 1820. *Venture* is given to *Elizabeth*, mean issue, so *may* the same words *without heirs*, in that clause of the will, on which *Garron's* remainder depends, bear the same construction, thereby give full force and efficacy to every part of the will, and carry into full operation the manifest intention of the testator.

Pratt
vs.
Palmer.

If then, on the death of *William Vickars*, the testator, *Garron* had an interest in this property, and if he had any, although in remainder, he was perfectly competent to dispose of it by his last will—Has he by that will, given that interest to one of the lessors of the plaintiff, so as to enable them to recover in the present action?

By the will of *Garron*, before set forth, he gave one half of all his estate to his illegitimate daughter *Henrietta Palmer*, of which there is no question, so far as her interest was concerned, she took a clear fee simple. The other half he devised to “the child *Rebecca Palmer* is now with,” and the question is, whether an unborn illegitimate child, of which the mother is pregnant at the time of the will, is capable of taking by devise?

It is not questioned but that a legitimate child could take; not so, it is contended, the illegitimate.

No express decision, *pro* or *con*, has been cited on this subject, and from *Hargrave's* Notes it was a doubtful point when he wrote. In *Moore's* Reports the limitation to an unborn illegitimate is said to be valid. *Roll's Abridgment* to the same effect. In *Croke Eliz.* it is doubted whether, on principles of policy, such dispositions should be favoured. The judges differed—one favourable to the illegitimate, one opposed, and the other inclined to the second opinion, saying he had consulted most of the judges, and a majority was against the illegitimate's claim.

In the case before the court, there is the utmost certainty as to the intended devisee; she is described as the child of which *Rebecca Palmer* was then with. *Ann Pratt*, one of the lessors of the plaintiff, is admitted to be that child, and she is competent to take, except excluded from political considerations, there being no uncertainty as to the person.

Where can be the justice or policy in punishing the innocent offspring for the criminal illegitimate intercourse between their parents? their situation is deplorable enough without being deprived of the pecuniary aid of those who

brought them disgracefully into existence. It is difficult to discover what principle of policy it is, that will enable the father of illegitimate born children, to provide for those that have lived long enough to acquire a reputed name, that will exclude him from making provision for the child that is unborn, and who, when it comes into existence, will stand more in need of assistance. Yet it is clear that provision can be made for the one, and doubtful as to the other.

JUNE 1820.
Pratt
vs.
Flamet.

Let the policy of the *English* courts in the reign of *Elizabeth* have been what it might, it has long ceased to be the policy of *Maryland* to have those children unprovided for; on the contrary, the subsequent marriage of the parents, legitimates the prior born children, and if the father is so unnatural, as to leave the child unprovided for, he can be forced to his duty, and compelled to take care of his offspring, although illegitimate. The devise then to the unborn child is, in the opinion of the court, valid. The remaining question is, whether on the death of her sister *Henrietta* without issue the whole went to the posthumous child?

On that subject the court have not the slightest doubt—The will is, “that if *either* of the children *die without heir*, then I give *their part to the other*.” We have seen that a remainder over to a collateral heir, will convert the meaning of the word *heir*, to *issue*; because the first devisee could not die without *heir living*, a collateral heir. The converse is equally true, that where the limitation or remainder over is to take effect on the first devisee’s *dying without heirs*, if that devisee, on whose estate the remainder depends, is of that description as to be *incapable of having heirs other than issue*, (which is the predicament of an illegitimate,) then it must follow, that by the word *heir*, issue or heir of the body only is intended; and therefore the court are of opinion, that on the death of *Henrietta*, without issue, her sister was entitled to the whole estate.

The judgment then of the court below is reversed, and judgment must be entered here for the appellant, the plaintiff below.

CHASE, Ch. J. (a). In considering the will of *William Vickers*, the apparent intention of the testator is to give

(a) This opinion of the Ch. J. was formed by him at the argument at a former term, and owing to indisposition he did not attend when the opinion of the court was delivered.

JUNE 1820. the lands in question, (*Piccadilly* and part of *Dunn's Range*;) to *Sarah Vickars*, his wife, during her life, with cross remainders in tail to his daughter *Elizabeth*, and the child with which his wife was supposed to be enseint—Remainder in fee to his brother *Jacob Garron*. This intention not being repugnant to any rule or principle of law, must prevail. The words “in case my children” (*Elizabeth*, and the child with which his wife was supposed to be ensient,) “die without heirs, I give and bequeath my aforesaid lands and negroes unto my brother *Jacob Garron*, to him and his heirs, for ever,” coupled with the words in the preceding clause, by which he devised the lands in question to the child *en ventre sa mere*, create, by necessary implication, cross remainders in tail in *Elizabeth* and the child *en ventre sa mere*. This will must be construed in the same manner as if the child had been born; and dying without heirs, means heirs of the body, because *Elizabeth* could not die without heirs, living the child, nor the child die without heirs, living *Elizabeth*. The interest acquired by *Jacob Garron*, under the will of *William Vickars*, in the lands in question, was transmissible by the will of *Jacob Garron*, which brings me to the consideration of his will, and to decide what interest in the said lands passed thereby, to whom, and to what extent.

Pratt
vs.
Flamer.

The true construction of this will, according to the manifest intention of the testator, is to give the lands in question to his two illegitimate children, *Henrietta Palmer* and *Ann Palmer*; (*Ann* being the child with which *Rebecca Palmer* was enseint at the time of making the will,) as tenants in common, in tail, with cross remainders over in fee. Can this intention be effectuated without infringing any rule or principle of law? If it can be, such exposition ought to be given to it.

It is established law, that a child, *en ventre sa mere*, is capable of taking by devise, and that by operation of law the interest in the land so devised will vest in the child when born, and in the meantime descend to the heir at law. It is equally well established, that an illegitimate child, or bastard, can have no heir but children or issue of the body.

The first clause of the will standing alone, and without the limitation over, would have given *Henrietta Palmer* an estate in fee in an undivided half of the lands in question;

but taken together, and considered with the second clause, that estate is qualified and converted into a tenancy in common in tail, with cross remainders over in fee.

JUNE 1820.

Maxwell
vs.
Senev

As a bastard can have no heir but issue of the body, I consider the words "if either of the children" (both being illegitimate,) "should die without heir," of the same import and meaning, in legal signification, as saying if either of the children should die without issue.

JUDGMENT REVERSED, &c.

COURT OF APPEALS, (E. S.) JUNE TERM, 1820.

MAXWELL, *et al.* vs. SENEY's Lessee.

APPEAL from a judgment in an action of ejectment, rendered in favour of the plaintiff in *Talbot* county court, for an undivided thirtieth part of a tract of land called *Londonderry*. The following case was stated for the opinion of that court, viz. That *Mark Benton* died intestate, and without issue, on the 4th of November 1808, seized of the lands and tenements mentioned in the declaration; and that said lands and tenements were acquired by the intestate by purchase, and not derived from or through either of his ancestors. That the intestate had three brothers and three sisters, to wit, *John*, *Vincent*, *George*, *Susan*, *Ruth* and *Mary*, all of whom departed this life long before the intestate. That *John*, the eldest brother, had three children, viz. *Abel*, *Polly* and *Sarah*. That *Abel* is still living, *Polly* married *Charles Burgess*, and died before *Mark*, the intestate, leaving three children, viz. *Sarah*, *George* and *Mary*; the two last are still living, and the first died intestate, and without issue. That *Sarah Benton*, the niece of *Mark*, the intestate, married *Henry Rochester*, and died long before the intestate, leaving a daughter named *Elizabeth*, who afterwards married *Samuel Cacy*, and died before *Mark*, the intestate, leaving a son named *Francis*, who is still living. That *Vincent* the second brother of the intestate, had the following sons and daughters, viz. *James*, *John*, *Vincent*, *Elizabeth* and *Mary*,

Under the act of 1786, ch 45, where one dies intestate and without issue, seized of an estate in land by purchase, and not derived from or through either of his ancestors, such estate descends to his brothers and sisters of the whole blood, and their descendants, in equal degree; and if one of said brothers or sisters die, leaving a grand child, or any the most remote descendant, as his or her heir at law, such child, or descendant, is entitled to the same interest in the estate, as the ancestor would have been if living, and takes the same *per stirpes* and not *per capita*.

JUNE 1820.

Maxwell
vs
Seney.

of whom *James* departed this life long before the intestate, and left two children viz. *Elijah*, and *Susanna* the wife of *Horatio Rochester*, which said *Elijah* and *Susanna* are both alive; *John* departed this life long before the intestate, and left one son, who died in his infancy, before the intestate; *Vincent* and *Elizabeth* are still living; *Mary* married *James Meeds*, and died long before the intestate, leaving only one daughter named *Rebecca*, who is now the wife of ——— *Blackiston*. That *George*, the third brother of the intestate, died without issue, and before the intestate. That *Susan*, the eldest sister of the intestate, married *Joseph Baxter*, and died long before the intestate, leaving the following children, viz. *Vincent*, *John*, *Joseph*, *Sarah*, and *Susanna*, all of whom are still living. That *Ruth*, the second sister of the intestate, married *John Seney*, and departed this life long before the intestate, leaving the following sons, viz. *Joshua*, *Samuel*, *Horatio*, *Jonathan* and *Robert*, of whom *Joshua* departed this life long before the intestate, leaving three sons, viz. *John*, *Joshua* and *Robert*; the first of whom died since the intestate, leaving one son named *Joshua*, (the lessor of the plaintiff,) who is an infant under the age of 21 years. *Joshua* and *Robert* last mentioned, are still alive. That *Samuel*, the second son of *Ruth*, departed this life long before *Mark*, the intestate, leaving three children, viz. *Jonathan*, *Joshua* and *Elizabeth*, of whom *Jonathan* and *Elizabeth* are still living; and *Joshua* was alive at the intestate's death, but has since died leaving two children. That *Horatio*, *Jonathan* and *Robert*, the other sons of *Ruth*, all died before the intestate, and without issue. That *Mary*, the youngest sister of *Mark*, the intestate, married *Charles Thomas*, and died long before the intestate, leaving one daughter named *Mary*, who married *Charles Vanhkle*, and departed this life after the intestate, leaving three children, viz. *Charles T*, *Lydia*, and *Elizabeth*, all of whom are still living. That *Joshua Seney*, the infant son of the late *John Seney*, and lessor of the plaintiff, claims a share of the lands and premises mentioned in the declaration. The county court gave judgment on the case stated for the plaintiff; and the defendants appealed to this court.

The case was argued in this court before BUCHANAN, JOHNSON, MARTIN and DORSEY, J.

Hammond, for the appellant, relied upon the act of 1786, JUNE 1820, ch. 45; *Sir T. Raym* 496, and *Cooper's Justinian*, 393 to 400.

Maxwell
vs.
Seney.

Goldsborough, for the appellee, also relied upon the act of 1786, ch. 45, and *Collier's Lessee vs. Stewart*, decided in this court in 1812.

BUCHANAN, J. delivered the opinion of the court.

Mark Benton, under whom the plaintiff in the ejectment claims, died seized of an estate of inheritance in the land mentioned in the declaration, which he acquired by purchase, leaving no child or descendant, or brother or sister, alive at the time of his death, but a number of collateral relations, the children, grand children, and great grand children, of his brothers and sisters, all of the whole blood. *Joshua Seney*, the lessor of the plaintiff, is a great grand son of *Ruth Benton*, one of the sisters, and seeks to recover an undivided part of the land of which *Mark Benton* died seized; and the question, which lies within a very narrow compass, is, whether he is entitled to any and what proportion of that land, and it is not necessary to look beyond the provisions of the act to direct descents, (1786, ch. 45,) on which it depends, to arrive at the intention of the legislature. The second section of that act, after directing in what manner an estate descended to an intestate shall go, provides, "that if the estate is or shall be vested in the intestate by purchase, and not derived from or through either of his ancestors, and there be no child or descendant of such intestate, then the estate shall descend to the brothers and sisters of such intestate of the whole blood, and their descendants, in equal degree," &c. And by the fourth section it is enacted, "that if, in the descending or collateral line, any father or mother may be dead, the child or children of such father or mother shall, by representation, be considered in the same degree as the father or mother would have been if living, and shall have the same share of the estate as the father or mother, if living, would have been entitled to, and no more; and in such case, where there are more children than one, the share aforesaid shall be equally divided among such children."

It is contended, on the part of the appellant, that in the collateral line, only those in equal degree, and none more remote than the children of brothers and sisters, can take,

JUNE 1820. and that they must take "*per capita*," and not "*per stirpes*," and the argument in support of these positions, as applicable to the first section of the law of descents, was very forcible. But whatever would be the true construction of that branch of the act, if it stood alone, the fourth section, the office of which is to ascertain who shall be considered as standing in the same degree, and the proportions to which they shall be respectively entitled, furnishes an interpretation that cannot be resisted, and is a full answer to any argument that can be drawn from the second section. If none could take but those in the same degree, it would follow, that where there are brothers and sisters, and children of a deceased brother or sister, as the brothers and sisters could alone stand in equal degree, they would take the whole estate, to the exclusion of the nephews and nieces. But this is obviated by the fourth section of the act, which, if it has any meaning, contemplates and provides for such a case, by declaring the children of a deceased father, or mother, to be in the same degree, by representation, as the father or mother would have been if living, and giving to them the same share of the estate that their father or mother, if alive, would have been entitled to, and thus the nephews and nieces, in the case put, are placed, not in fact, (which cannot be,) but by representation, in the same degree of relation to the intestate, with the surviving brothers and sisters, and are not excluded from a participation in the estate, but are entitled to whatever would have been the proportion of their father or mother.

The argument, that among collaterals none beyond the children of brothers and sisters can take, however ingenious and well urged, cannot be sustained. The words, "any father or mother," in the fourth section of the act, cannot be restricted to the brothers and sisters of the intestate; that would be an arbitrary interpretation, not warranted by any thing to be found in the law itself, and contrary to any known rule of construction, but are unlimited, and must apply to any father or mother in the descending or collateral line, in any the remotest degree. Thus, if there be a brother and a nephew, the son of a deceased brother, the nephew, by representation, stands in the same degree with the brother, and will take one half of the estate, being the share to which his father would have been entitled, if alive; and if the nephew be dead, leaving a child, that child is

considered by representation, in the same degree as his father would have been, if living, and so on *ad infinitum*; and as the same section directs, that where there are more children than one, the share of their deceased father or mother, and no more, shall be equally divided among such children, it follows that they must take "*per stirpes*" and not "*per capita*," and that was settled in the case of *Collier* and *Stewart*; for no matter on what ground *John Stewart*, the defendant, claimed, *Helena Collier* could on no other principle have been entitled to one eighth part of the estate of the intestate, the proportion that was adjudged to her in that case; and the same principle governs this case. The collateral relations of *Mark Benton* were the descendants of two brothers and three sisters, making five *stirpes*; there were six grand children of *Ruth Seney*, one of the five *stirpes*; and *Joshua Seney*, the lessor of the plaintiff, is the only child of *Joshua Seney*, who is dead, and was one of the six grand children of *Ruth*; he therefore is entitled to a sixth part of a fifth of the land mentioned in the declaration, being one thirtieth of the whole.

Mercer
vs.
Walmsley.

JUDGMENT AFFIRMED.

COURT OF APPEALS, (E. S.) JUNE TERM, 1820.

MERCER vs. WALMSLEY.

APPEAL from *Cecil* county court. This was an action on the case, brought by the appellee against the appellant. The declaration stated—"That whereas the said *John Mercer* contriving, and wrongfully and unjustly intending, to injure the said *William Walmsley*, and to deprive him of the service and assistance of *Margaret Walmsley*, the daughter and servant of him the said W. heretofore, to wit, on the 1st day of July 1816, and on divers other days and times between that day and the day of issuing forth the original writ in this cause, at *Cecil* county aforesaid, debauched and carnally knew the said M. then and there,

An action on the case *per quod servitium amisit*, will not lie by a father for the seduction of his daughter, where she is above the age of 21, and not in his actual employment—Otherwise where she is under that age.

Where a daughter, either of age or under age, is seduced in the father's house, he may maintain either an action of trespass *q. c. fre-*
git, and lay the seduction and loss of her service, as

consequential, or an action on the case against the seducer.

Where a daughter is above 21, very trifling acts of service are sufficient evidence of her being in fact his servant.

Whether a father can support an action *per quod servitium*, &c. where the daughter is above age, without proving some acts of service? *Quere.*

Where the evidence is all on one side the court have a right to say that it is not sufficient to entitle the party to a verdict.

A father, as such only, cannot maintain an action *per quod servitium amisit*, for the seduction of his daughter.

Whether a father may not bring this action for the seduction of his daughter, under age, although she does not reside with him, and has no intention of doing so, and although such intention is known and assented to by the father? *Quere.*

JUNE 1820. and from thence, for a long space of time, to wit, hitherto being the daughter and servant of the said W. whereby the said M. became pregnant, and sick with child, and so remained and continued for a long space of time, to wit, for the space of nine months then next following; at the expiration whereof, to wit, on the 7th day of April 1817, at Cecil county aforesaid, the said M. was delivered of the child with which she was so pregnant as aforesaid; by means of which said several premises, she the said M. for a long space of time, to wit, from the day and year first above mentioned, hitherto became and was unable to do or perform the necessary affairs and business of the said W. so being her father and master as aforesaid, and thereby he the said W. during all that time, lost and was deprived of the service of said daughter and servant, to wit, at Cecil county aforesaid; and also by means of the said several premises he the said W. was forced and obliged to, and did necessarily pay, lay out and expend, divers sums of money, in the whole amounting to \$500, in and about the nursing and taking care of his said daughter and servant, and in and about the delivery of the said child, to wit, at Cecil county aforesaid. Wherefore the said W. saith he is injured," &c. The defendant pleaded not guilty, and issue was joined.

Mercer
vs.
Walmsley.

At the trial of the cause, the plaintiff to support the issue on his part, produced *Margaret Walmsley*, his daughter, who proved, that some time in the year —, her father sent her to the defendant's house to live; that upon her arrival there the defendant told her he had promised her father she should live with him as long as she lived, that he was better able to maintain her than her father was. That she had been at the defendant's more than a year before he spoke indelicately to her. That she usually slept in the room with the defendant's daughter, *Mrs. Davis*, but her bed in that room being occupied some time in the month of July 1816, she went to bed in an adjoining room. That during the night, the defendant came into her room, whilst she was asleep, and got into bed with her. That she made resistance, but he stopped her mouth with the sheet, and succeeded in having criminal knowledge of her. That he afterwards lay a considerable time in bed with her, without her making any noise or attempt to alarm the family. That he promised to marry her, or forfeit all he was worth in the world. That whenever *Mrs. Davis* was away, she

did not sleep in the defendant's house except on two occasions, both of which happened after the criminal connexion. That she will be 25 years of age on the 1st of April 1819; and lived in the defendant's house near three years, and left it five months after she became pregnant. Before she went to the defendant's house to live, she had been living first at a Mr. *Porter's* when she was between 14 and 15 years of age; and after staying there some time, returned to her father's house. Some time afterwards she went to live with Mrs. *Savin*, from thence she again returned to her father's, and then went to live at *Gideon Longfellow's*, where she continued a few weeks before she went to live at the defendant's. Upon going to the defendant's to live, she made no contract for wages, but after she had been there some time, the defendant gave her money, and told her, whenever she wanted any to tell him and he would give it to her. That she did frequently ask him, and he always gave her money, That she also received money once from her father, whilst she lived with the defendant, and occasionally got articles out of two different stores, in which she had a credit on her father's account. That whilst she lived in the family of the defendant, she knit, spun and sewed, and attended to house keeping affairs generally. That she always conceived herself at liberty to leave the family of the defendant whenever she might choose so to do; and frequently went to her father's on a visit, and to help them, when they had a press of work; and once went to nurse her step-mother, who was ill. That after the act of criminal connexion, the defendant sent her to a Mr. *Williams*, in *Delaware*, where she was delivered of a child; and while there, her brother came to her, and told her, that her father had provided a home for her; but she did not go; and shortly afterwards the defendant came and carried her from *Williams's* to *Wilmington*, and from thence she went, at his instance, to *Philadelphia*. At leaving *Wilmington*, the defendant gave her three dollars. She did not know that her father was apprised of her removal from Mr. *Williams's*, or the place to which she went. On her arrival in *Philadelphia*, she went to Mrs. *Fisher's*, and remained there a short time, when her father sent for her, and she went with his messenger to the house of a relation of her's, where she has remained ever since. That she would have returned to her father's house, had Mrs. *Davis* either

JUNE 1820.

Mercer
vs.
Walmsley.

JUNE 1820. died or removed, at any time whilst she lived there. The defendant never had connexion with her but once whilst she lived with him; and she never had connexion with any other person. That each time she returned to her father's house, it was to stay there until she got another place; and she does not know that her father has been at any expense, or paid any money on account of her sickness or lying in. That she was delivered of the child on the 7th of April 1817, at Mr. *Williams's*, where the defendant had sent her. The first advances made by the defendant, was about a year after she first went to reside at his house, and he made repeated advances between that time, and the time he succeeded. That the reasons why she did not quit the defendant's house, after he had made those proposals to her, were that he persuaded her not to remove from his house, and continue to respect his promise to marry her. That she did not consider herself authorised to demand, nor did she expect to recover pecuniary compensation for any services rendered by her in the family of the defendant; nor did she consider the defendant bound to pay her; and that she considered the money given to her by the defendant, as a gift made to her by him in consequence of the services she had rendered about the house. The plaintiff here rested his case; and the defendant then prayed the court to direct the jury, that the evidence produced by the plaintiff was not sufficient to entitle him to recover. Which opinion the court [*Earle*, Ch. J. *Purnell* and *Worrell*, A. J.] refused to give. The defendant excepted. Verdict and judgment for \$6000 current money, damages, and costs. The defendant appealed to this court.

Mercer
vs.
Walmsley

The cause was argued in this court before BUCHANAN, JOHNSON and DORSEY, J. by

Gale and *Cosden*, for the appellant, (a) and by

Chambers and *Carmichael*, for the appellee. (b)

BUCHANAN, J. delivered the opinion of the court.

(a) They cited 1 *Chitty*, 47. 5 *East*, 45. 2 *T. R.* 166. 10 *Johns. Rep.* 115. *Ld. Raym.* 1032. 5 *Bos. & Pull.* 476.

(b) They also cited 2 *T. R.* 166. 5 *East*, 47. 3 *Burr.* 1878. 10 *Johns. Rep.* 115. *Doug.* 119. 2 *H. Blk. Rep.* 187. 4 *Harr. & M. Hen.* 547. 3 *Wils.* 47. 4 *Cranch*, 71. 8 *Johns. Rep.* 495, 496, 505. 9 *Johns. Rep.* 387.

The objection, that an action on the case will not lie, by JUNE 1820.
 a father, for debauching and getting his daughter with child, *per quod servitium amisit*, cannot be maintained either on principle or authority. Where a man illegally enters the house of another, and debauches his daughter, the father may have an action of trespass *quare clausum fregit*, and lay the debauching of his daughter, and loss of her services as consequential; or he may at his election, bring an action on the case for debauching his daughter, *per quod servitium amisit*; but for merely debauching a man's daughter, unaccompanied by an unauthorised entry into the father's premises, the action is case, and the loss of service is the gist of the action.

Mercer
 vs.
 Walmsley

The only question, therefore, in the case before us is, whether the evidence exhibited in the bill of exceptions is such as to enable the plaintiff to recover? and we clearly think that it is not. *Margaret Walmsley*, the daughter, the only witness examined at the trial, was produced by the father himself, and from his own shewing it appears that she was upwards of twenty-one years of age, was not his servant *de facto*, and did not live with him at the time she was debauched; but that she was living at the house of the defendant, where she had lived more than a year, doing different descriptions of work, and attending to the affairs of the family generally.

A father may maintain an action for debauching his daughter when under age, *per quod servitium amisit*, whether she was living with him at the time the offence was committed or not; for from the legal controul he had over her services, the law implies the relation of master and servant, unless in the case of her not living with him, he had, by some act of his own, destroyed that relation. She is his servant *de jure*, and by debauching her, an act is done that deprives him of services which he might have exacted. In the case of *Dean vs Peel*, reported in *5th East*, 47, it was held, that the daughter being in the service of another, and having no *animus revertendi*, the relation of master and servant had ceased to exist, and that therefore the father could not maintain the action. But it is much questioned whether merely by her volition a daughter under the age of twenty-one years, can so divest her father of his power to reclaim her services as to affect his right of action. But when a daughter is over the age of 21, and

JUNE 1820

Mercer
vs.
Walmesley

not in the actual service of her father when the injury is done, he cannot sustain the action. And so are all the authorities except the case of *Johnson vs M. Adam*, cited in the case of *Dean vs Peel*. In that case, the daughter was under the age of 21 when she left her father's house, but attained that age a short time before she was seduced; and the judge before whom the cause was tried, considering it a middle case, saved the point; there was no new trial moved for, and the question was never afterwards decided. But it appeared in summing up the evidence to the jury, that the judge went on the ground, that from the circumstances of the case, she might be considered as continuing to be a part of her father's family. If a daughter be living with her father, and in his service, though over the age of 21, the action may be sustained, and any slight service will be sufficient to raise the inference of fact, that she was his servant; as in the case of *Bennet vs Alcott*, 2d Term Rep. 166, where the daughter was 30 years old. But where the daughter was above the age of 21, and in the service of another at the time of the injury, the action cannot be maintained by the father.

In this case it is contended, that the daughter was not the servant of the defendant, there being no contract for wages; but let it be remembered, that he frequently gave her money in consideration of the services she rendered in his house of a menial nature, and authorised her to call for money whenever she wanted it, and that she was living with him at the time; and it is enough to defeat the action, that she was not *living* with her father, but with another. It is only where a daughter, being above 21, was *living* with her father, that a slight act of service is held to be evidence of her being in fact his servant; and it is not like the case of an *infant* daughter, living out of her father's family, where the *law* implies the relation of master and servant, for *eo instantur* that the daughter reaches the age of 21, the relation of master and servant *de jure* ceases to exist, and the *law* will not imply it. It must be shewn that she was her father's servant *de facto*, at the time, &c. which cannot be when living in the family of another, as in this case.

It has been urged in argument, that whether *Margaret Walmesley* was the servant of her father or not, at the time she was seduced, was a fact proper to be found by the ju-

ry, and not within the province of the court to decide; and **JUNE 1820.**
 on that ground the refusal of the court to direct the jury,
 that the evidence produced by the plaintiff was not sufficient
 to support the issue on his part, is defended. But the
 principle, that the jury is the proper tribunal to judge of
 the facts, in a cause that is tried before them, is not appli-
 cable to this case, and cannot be brought in aid of the argu-
 ment. Here the evidence was all on the side of the plain-
 tiff, and the facts on which he rested his case appear in the
 bill of exceptions. These facts shew that his daughter was
 more than 21 years old, was not in his family; but living
 in the house of the defendant, at the time she was debauched.
 From his own shewing, therefore, it is proved, that
 she was not in his service at the time of the injury com-
 plained of, and the jury could not be left to infer that she
 was, in direct opposition to the only proof in the cause, and
 that proof too, produced by himself; there was nothing to
 be found by the jury. The bill of exceptions exhibits the
 plaintiff's case, his supposed cause of action; and the ques-
 tion was not a question of fact, whether she was in the
 service of her father or not, but whether, not being in his
 service, and above the age of 21, the action could be main-
 tained; which was a sheer question of law for the court to
 decide; and the law being clear that it could not, the court
 ought so to have directed the jury.

Mercer
 vs.
 Walsley

JOHNSON, J. A father cannot sustain an action for the
 seduction of his daughter of *full age, not residing with*
him; and it seems doubtful whether the action is maintain-
 able if she is living with him, unless she is in the habit of
 rendering services to her father; and although they may be
 inconsiderable, yet they would seem essentially necessary
 to authorise him to sustain the action.

In the case of 2 *Term. Rep.* 166, where the action was
 brought for the seduction of the daughter, *per quod servi-
 tium amisit*, the daughter was living with the father, she was
 thirty years of age, and from any thing appearing in the
 case, never had left her paternal roof. Even those circum-
 stances, it would seem, were inadequate to the maintain-
 ing of the action, unless she was in the practice of render-
 ing services to, or working for, the father; which was relied
 on as the ground of the determination sustaining the ac-
 tion.

JUNE 1820.

Merwer
vs.
Walmsley

The foundation of the action *per quod servitium amisit*, is the right of the plaintiff to those services; for the loss of which he claims compensation. For, as for every loss or injury there is a remedy, so also where there is no loss or injury no suit can be sustained. No person can complain and claim a compensation for the loss of services, unless he had a right to those services; and no father can complain in law for the seduction of his daughter of full age, acting for herself, unless the right to the suit depended on the *connexion of father and child*, and if that was of itself sufficient, then it would follow, that a father in all cases could maintain the suit, a position not maintainable.

It is believed that all the cases which have been produced establish incontrovertibly, that the father, as such, is incompetent to maintain the action; and if, as such, he cannot support the claim, another connexion than that of father and child is indispensably necessary.

Where the daughter lives with the father, *rendering services*, that connexion is sufficient, even when she is at the time of the seduction of full age. Where she is a minor, whether residing with him or not, the suit can be sustained, because *he has* a right to her services, and can control her.

In the case of 5 *East*, 47, the daughter, at the time of seduction, was a minor, not residing with the father. There the suit *was not sustained*; the reason given for the opinion *was, because she never intended to return to the father*. I doubt the correctness of that decision, founded on such a reason. For the right of the father to the services of the daughter, during minority, depends not on her. Let her design to leave him be ever so determined, she has no legal right so to do, or when from under his roof, she has no right to form a determination never to return; and if such a determination is made, still the father has a right to compel her return, and have the benefit of her services. Nor is it clear to me, that even with the consent of the father, that she should permanently leave his protection, would the case be materially different; for as no contract between the father and minor daughter would be binding, a stipulation or understanding that she should permanently leave him, and shift for herself, would be nugatory. But that is not the case now before the court. It will be time enough ultimately to determine what *respect* should be paid to the case in

5 *East*, when a similar cause is brought before the court. JUNE 1820.
I say, what *respect*, for it is no *authority* binding on this court.

Mercer
vs.
Walmsley

The case in 5 *East*, and the case of *Johnson vs. M^r Adam*, were mainly relied on by the appellee in this case. The case in *East*, as establishing the position, that the *gist of the action was the animus revertendi*, and that where that existed, whether the seduction took place while living with her father or not, whether a minor, or of full age, was immaterial.

The right to sustain the suit cannot depend on that principle. The right of the father to claim a compensation for the loss of services, must rest on his legal right to those services; it rests on a more solid foundation than his daughter's intention.

It may be sufficient to remark, that the case of *Johnson vs. M^r Adam*, was a *nisi prius* decision, made by one judge only, who undertook to draw a line of discrimination, not warranted, in my opinion, by the previous decisions. That case could only have been sustained on the ground of an express or implied contract existing between the father and daughter, that she would serve him. But the case of *Johnson vs. M^r Adam* is distinguishable from the case before the court; and if it was not, it cannot be called an authority obligatory on this court.

The decisions that have taken place in the State of *New York*, place the action on the correct principle or foundation, that is, the right to the services of the daughter express or implied; it is believed, on a careful examination, it will be found that it is the *gist* of the action.

In 10 *Johns. Rep.* 115, the suit could not be sustained, the daughter having been of full age, and occasionally working out for wages, although she was in the habit of applying those wages to the accommodation of her parents.

In a case like that, there must have been every inclination on the part of the court to sustain the suit, and had they pursued the course that was adopted in *Johnson vs. M^r Adam*, it would have been described as a *middle* case, and the action would have been maintained; for by the same principle that ruled the case before Justice *Wilson*, the judges of *New York* might have inferred, that as the daughter was in the habit of applying her wages to the benefit of her father's family, there was an implied agreement

JUNE 1820.

Wickes
vs
Caulk

she should so apply them, and consequently, by the act of the defendant, the father was deprived of her services, and the suit could be sustained. But such was not the decision. It seems to make a material difference in the estimation of the counsel for the appellee, that before the father can be deprived of his claim to services, when the daughter is of age, that some *other* person, under a subsisting contract between him and the daughter, should have a right to them. But it is not necessary, in order to defeat the suit, that that should be the case. If she is a minor, the father rightfully claims; if of age and hired out, the master claims; if of age, not residing with her father, she is her own mistress, and works for herself, and no person can legally complain of being deprived of her assistance.

JUDGMENT REVERSED.

COURT OF APPEALS, (E. S.) JUNE TERM, 1820.

WICKES'S LESSEE vs. CAULK.

Attesting witnesses are not necessary to a deed, and where their names are erased, it is incumbent on the party, wishing to avoid the deed, to prove that the erasure was made after its execution and delivery.

The erasure of the names of attesting witnesses to a deed, by a stranger, after its execution and delivery will not avoid it.

Where a deed was recorded within time, and the year when it was acknowledged was omitted in the acknowledgment, the legal inference is, that it was legally acknowledged.

The decisions of a tribunal, having no jurisdiction, are not voidable only, but void.

APPEAL from *Kent* county court. Ejectment for a tract of land called *Tulip Forest*. The defendant in the court below, (the present appellee,) took defence on warrant, and plots were returned.

1. At the trial the plaintiff read in evidence a grant of the tract of land called *Tulip Forest*, made to *Simon Wickes* on the 6th of November 1790, and traced the title from *Simon Wickes* to the lessor of the plaintiff. The defendant then read in evidence a grant of the tract of land called *Arcadia*, made to *Michael Miller* on the 5th of May 1682; and also the will of *Miller*, the grantee, dated the 29th of December 1698, devising the land called *Arcadia*, which remained unsold at his death, to his son *Arthur*, and his issue lawfully to be begotten; and produced a witness, by whom he proved that the witness was acquainted with *William Moore*, deceased, who was re-

A tribunal of special jurisdiction must shew its jurisdiction on the face of its proceedings. Under the act of 1718, ch. 18, the whole, or a majority of the commissioners only, are competent to act, unless where a selection of a less number, not less than three, is made by those interested in the bounds of lands to be settled. If such a selection be made by other persons than those interested, and the commissioners proceed to act under it, their acts are void, and not aided by any length of acquiescence in their decision.

puted to be the eldest son of *John Moore*, deceased, and JUNE 1820.
 that *William Moore* died about 40 years ago, and was, at
 the time of his death, and had been for at least ten years
 before that time, residing in the house located on the plots
 as the house of the defendant, and was possessed of the
 same. He then offered in evidence the will of *William
 Moore*, dated the 29th of January 1779, devising all the
 remaining part of his estate, both real and personal, to his
 son *John*, and his heirs; and a commission and proceedings
 thereon, hereinafter mentioned; also a deed from *Arthur
 Miller*, and *Sarah* his wife, to *John Moore*, dated the 20th
 of November 1706, for part of the tract of land called
Arcadia, which deed appeared to have been executed in the
 presence of two witnesses, (the justices who took the
 acknowledgment) and whose names were erased; and was
 acknowledged as follows, viz. “*Mar. (a)* ye 14th 1706.
 Then came *Arthur Miller*, and his wife, *Sarah Miller*, be-
 fore us *Thomas Ringgold* and *John Wells*, two of his ma-
 jesty’s justices for *Kent* county, and did acknowledge the
 within conveyance unto *John Moore*, as ye law directs. As
 witness our hands the day above written.

Thos. Ringgold,
Jno. Wells.”

“April 12th Anno Dom. 1707. Enrolled in the records
 of *Kent* county in Liber G. L. No. 2, page 24 and 25, pr. me.

“*G. Lunley, Cler. Cur. Coun. Canti.”*

The deed was then objected to by the plaintiff as improper
 evidence in the cause, and as not being sufficient to pass a title
 to the land mentioned therein; because the witnesses’ names
 appeared to have been erased, and the acknowledgment to
 have been made before its execution, and because the en-
 rolment seemed to have been more than twelve months af-
 ter the date of the said acknowledgment. But the court
 [*Earle, Ch. J. and Worrell, A. J.*] overruled the objection,
 being of opinion that the deed was competent evidence
 and sufficient to pass the title. The plaintiff excepted.

2. The defendant then offered in evidence a deed from
Arthur Miller, and *Sarah* his wife, to *Nicholas Poor*, dated
 the 6th of October 1707, for part of the tract of land
 called *Arcadia*—which deed was certified to have been
 acknowledged on the 6th of *October*, (omitting the year,) and
 was recorded on the 8th of January 1707. It was

(a) This word is not very distinctly written.

JUNE 1820

Wickes
vs
Caulk

objected to by the plaintiff as insufficient to pass the title to the land mentioned in it, as the acknowledgment did not show in what year it was taken, and as the enrolment appeared to have been made before the date of the deed, and before the date of the acknowledgment. The original deed, and the record of it, were both produced, and the dates of the deed and certificates appeared to be the same in both. But the court overruled this objection, and suffered the deed to go to the jury, as sufficient to pass the title. The plaintiff excepted.

3. The defendant then offered in evidence the record of a commission, and the proceedings thereon, to ascertain the bounds of *John Moore's* lands, under whom the defendant claimed title, for the recovery of which this suit was instituted. The *commission* bears date the 4th of August 1718, and was issued in pursuance of the act of 1718, *ch.* 18, by the governor, directed to nine persons, with a *dedimus* to five of them, empowering any of them to administer the necessary oaths to the other persons named as commissioners; and the persons so sworn, or any of them, were empowered to administer the said oaths to the other commissioners. These oaths appear to have been duly administered on the 20th of August 1718. The *proceedings* referred to state, that "pursuant to an act of assembly of this province now in force, entitled, *An act for ascertaining the bounds of land within this province, John Moore, late of Saint Paul's Parish in Kent county, &c.* having twenty days before the preferring his petition to the commissioners appointed for ascertaining the bounds of land in the county and province aforesaid, met at the court house in the town of *Chester*, in said county, on the 19th of August 1719, according to the directions of said act of assembly, *thereby giving due notice to all persons* that were any way interested or concerned in the bounds of a certain tract of land called *Arcadia*, lying, situate and being, in the parish, county, and province aforesaid, of his design of his making his application to the said commissioners for the ascertaining the bounds of a part or parcel of land, part of that tract of land called *Arcadia*. The said *John Moore's* petition being read before the commissioners aforesaid, a certain *Dominick Kenslaugh* appears as guardian of a certain *William Kelley*, son of a certain *Daniel Kelley*, deceased, the said *William Kelley* having a tract of land adjoining

to the said parcel or tract of land of the said *John Moore's* JUNE 1820.
to defend the right and injury of the said *William Kelley*.
John Moore, complainant, and *Dominick Kenslaugh*, as
guardian of the aforesaid *William Kelley*, tenant, proceed
to choose commissioners to determine the matter in con-
troversy and dispute between the parties contending. The
names of the commissioners mutually chosen by the afore-
said parties are as follow, viz." &c. Here follow the names
of five of the commissioners before mentioned, who ap-
pointed the 29th of September 1719, and made public de-
claration thereof, and ordered notes to be set up at the
court house door, parish churches, mills, and most frequented
towns in the county, of their resolution and design to meet
on the said lands in dispute, viz. *John Moore's* dwelling
house on the said land. That the clerk issue summonses
for evidences and witnesses to meet at the time and place
appointed. That *D. M.* be and appear at the time and
place appointed, to survey the lands in dispute. On which
day the commissioners met at the place appointed, and ad-
ministered the oaths to their clerk, and to the surveyor.
They ordered *John Moore's* petition to be read, and which
is set out in the proceedings. And the commissioners,
sheriff, surveyor, &c. and the parties contending, being all
present, at the time and place appointed, for the better dis-
covery of the true bounds of the land in dispute, the com-
missioners, other officers, and the parties contending,
withdraw from the house of the said *John Moore*, to the
place where the easternmost bounded tree of the tract of
land called *Arcadia* was supposed to stand, when and
where the commissioners aforesaid proceed to hear the
conveyances of the parties contending, and the patent of
the tract of land called *Arcadia* read, and to swear such
evidence as the aforesaid commissioners and parties con-
tending as aforesaid might think fit, in order to the better
settling and ascertaining the bounds of the land in the
said petition of the said *John Moore* mentioned. *Domi-
nick Kenslaugh*, as guardian of *William Kelley*, produces
several papers, amongst which were, &c. Other conveyances,
&c. were produced and read, and sundry witnesses were
sworn and examined, and their testimony reduced to writ-
ing, &c. Chain-carriers were summoned and sworn. And
the commissioners aforesaid having duly and impartially
considered, as well the proof and allegations of both par-

Wickes
vs
Caulk

JUNE 1820. ties, as all other circumstances nearest concerning with the true intent of the original surveys, did cause the said *D. M.* surveyor, then to begin at a marked hickory tree, &c. which was accordingly done in the presence of the said commissioners, who ordered and adjudged the particular boundaries, &c. to the respective parties of their lands; and they put *Moore* in peaceable possession of the bounds so determined. They ordered that the surveyor make out certificates and plots of the aforesaid tracts of land, &c. which were made and set forth in the proceedings. After which the proceedings go on to state, that "the aforesaid commissioners, being informed that the aforesaid *William Kelley* was not a minor at the time of the aforesaid *John Moore's* preferring his petition for ascertaining the bounds of land adjoining to the said *William Kelley's* land, but that the said *Dominick* had of his own accord, and maliciously, wilfully and wittingly, without any regard to the interest of the said *William Kelley*, but on the contrary plotting and fraudulently intending to deceive and defraud the aforesaid *William Kelley*, and the aforesaid *John Moore*, of their lawful and just rights and claims to the aforesaid parcels of land, settled and bounded as aforesaid; and the same appearing, on due examination, to be only a contrivance of the said *Dominick*, by his appearing as guardian to *William Kelley* aforesaid, thereby to cast the cost and charges on the then supposed minor, *William Kelley*, in case that the commissioners aforesaid should have given judgment against the said *Dominick*, as guardian to *William Kelley* aforesaid. Therefore it is considered by the aforesaid commissioners, that the aforesaid tracts of land for ever hereafter remain, be, and continue, as the bounds of the lands of the aforesaid *John Moore* and *William Kelley*, as by the aforesaid certificates and plots, hereunto annexed, appeareth; and that the aforesaid *John Moore* and *William Kelley* be, continue and remain, in the peaceable possession of the said several parcels of land as above certified, and as by the plots hereunto annexed for ever; and that the said *Dominick Kenslaugh* pay all costs and damages, amounting to 2240lbs. of tobacco, and twenty shillings current money, the same to be paid by the said *Dominick*, and not as guardian of the aforesaid *William Kelley*; and that Mr. *S. W.* high sheriff of *Kent* county, levy by way of execution the aforesaid sum of

Wickes
vs
Caulk

2240lbs. of tobacco, costs, and twenty shillings current JUNE 1820.
 money, of the body, goods and chattels, of the said *Dominick Kenslaugh*." The defendant then prayed the court to direct the jury, that the said record of the said commissioners was conclusive evidence of the true locations of the lands mentioned in the said record of proceedings of the commissioners. To which the plaintiff objected. But the court overruled the objection, and permitted the record to be read to the jury, as conclusive evidence of the true location of the lands mentioned in it. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

Wickes
 vs
 Caulk

The cause was argued here before BUCHANAN, JOHNSON, MARTIN, and DORSEY J. by

Chambers and Tilghman, for the appellant, and by

Carmichael and Eccleston, for the appellee.

DORSEY, J. delivered the opinion of the court (a).

It has been urged by the appellant's counsel, that the deed from *Miller* and wife to *Moore*, inserted in the first bill of exceptions, was inoperative on two grounds: 1st. Because the deed appeared to be acknowledged before its execution; and 2dly. Because the names of the attesting witnesses were erased. The first objection is not well founded in point of fact, and must be abandoned by referring to the change produced by the alteration of the calendar.

The court are of opinion that the second objection cannot be sustained. There is no evidence in the record that any person or persons attested the execution of the deed. By the inspection of the original deed, the names of the two persons are written in the place where attesting witnesses generally write their names, and the names are erased, but when they were erased, whether before or after the execution of the deed, does not appear; and it is incumbent on the party who wishes to avoid a deed by its erasure, to prove that the alteration was made after its execution and delivery. Attesting witnesses are not necessary to the validity of a deed, and the erasure of their names, by a stranger, would not avoid it. As the court therefore

(a) Buchanan and Martin, J. concurred.

JUNE 1820: were not bound to presume that the erasure was made by the grantee, or those claiming under him, after the execution and delivery of the deed, the lessor of the plaintiff could not call on the court to declare the deed inoperative.

Wickes
vs
Caulk

The court are also of opinion, that the opinion expressed by the court below, in the *second* bill of exceptions, is correct. Both the deed and acknowledgment were recorded within the time prescribed by law, and although the year in which the acknowledgment was made does not appear on the deed in letters or figures, it must necessarily have been made in due time, or it could not have been recorded within due time.

The next question which presents itself for the consideration of the court, is this—Has the court erred in the opinion which they gave on the *third* bill of exceptions?

It must be admitted that the act of 1718, *chap. 18*, created a special jurisdiction unknown to the common law, and clothed the commissioners with powers of an extraordinary, and we might add of a frightful nature: They are empowered to establish the bounds of lands upon the application of any person interested, and the parties litigant were debarred the aid of counsel. No review or appeal was allowed from their decision, except to the King in Council, and that only in cases where the acting commissioners should adjudge, that the pretensions of the party grieved exceeded three hundred pounds sterling. It was urged in argument by the counsel for the appellee, that the proceedings of the commissioners, being unappealed from, and unreversed, must be conclusive evidence of the facts found by them, as all review, except before the King in Council, is expressly interdicted by the act.

It is a well established principle of law, that the proceedings of any tribunal, not having jurisdiction over the subject matter which it professes to decide, are *void*; and it is equally well established, that the proceedings of tribunals of limited jurisdiction must, on the face of them, state the facts which are necessary to give them jurisdiction.

The Circuit Courts of the *United States*, as it respects their jurisdiction between citizens of different states, are considered as courts of limited jurisdiction, and therefore it must be averred on the record, that the plaintiff and de-

fendant are citizens of different states, or their proceed- JUNE 1820.
ings would be irregular. It is unnecessary to cite authority to prove this proposition, as it must be familiar to all who have read the decisions of the Supreme Court, as reported by *Cranch*.

Wickes
vs
Caulk

That the proceedings of tribunals having no jurisdiction to decide the case, are not voidable, but void, is a proposition equally clear, and among other cases, was fully established by this court in the case of *Partridge vs. Dorsey's Lessee*, at December term 1813, where the court decided, that a plaintiff in an ejectment might shew that a decree of the chancellor, ordering lands to be conveyed in a case where he had no jurisdiction to make such a decree, was void, and he therefore could give no title, though such decree had not been appealed from or reversed.

If the proceedings exhibit a case in which the commissioners who did act, had power to act, their award is final, until reversed in the manner prescribed by the act; but if on the contrary they shew themselves that they had no jurisdiction, the whole must be considered as *coram non jūdice*, and therefore a nullity.

The law provides that the commissioners named by the governor shall meet at their several and respective court houses the second day of every county court, to receive the petitions, which must be in writing, of all persons that shall have occasion to make application to them for the ascertaining the bounds of any lands, lying in the county, provided that the party petitioning, twenty days before the preferring such petition, shall have given due notice of his intention to apply, by setting up notes at the court house door, and parish church, where the land lies, certifying the time when he means to make application to the commissioners, at which time and place all persons, both complainants and defendants, concerned in the dispute about the bounds of such lands, are required to meet, and in the presence of the commissioners present, to make choice of any number of the aforesaid commissioners, not being less than three, to determine the matter in controversy, which number of commissioners, being mutually chosen by the parties contending, shall proceed to decide, &c.

The law further provides, that if any party concerned, or any way interested in the bounds of lands in dispute, shall obstinately or wilfully, after publication as aforesaid,

JUNE 1820. refuse to meet the complainant before the commissioners, at the time notified for the preferring the petition, or if present will not join in making the election or choice, that then it shall be lawful for the major part of the commissioners, not being related to either party, or interested in the lands in dispute, to proceed in the manner as before mentioned.

Wickes
vs
Caulk

To give jurisdiction, therefore, to the commissioners, whose acts are the subjects of consideration, four things at least are essential; first, that *Moore* should give the notice prescribed. Secondly, that he should petition the commissioners. Thirdly, that the land should lie in *Kent* county. And fourthly, that the commissioners were a regular constituted board. Let us then examine whether the board who acted were regularly constituted?

It is in proof, that seven commissioners out of the nine qualified, and that the board of commissioners who acted, were selected by the petitioner, *Moore*, and one *Kenslaugh*, who represented himself to the commissioners as the guardian of *William Kelley*, who was interested in the establishment of the bounds which *Moore* sought to prove. The commissioners further certify, that they had discovered that *William Kelley* was of age at the time *Moore* exhibited his petition, and that *Kenslaugh* had fraudulently represented himself as the guardian of *Kelley*.

From these facts, which are certified by the commissioners, it is evident that they were chosen by election, when they ought not to have been selected in that manner. *William Kelley*, who was of age, either did or did not attend the meeting of the commissioners according to the notice of *Moore*; if he did attend, he did not unite with *Moore* in the election of commissioners; and either in the event of his attending and not uniting in the choice, or of his refusing to attend, the law has expressly declared that the acting commissioners shall not be designated by election. It is no answer to say that *Kenslaugh* represented himself as the guardian of *William Kelley*, because the commissioners certify that they had discovered the fraud practised by him, and had amerced him therefor in a considerable sum. As soon as the commissioners had detected the fraud, they should have ceased to act, as not being a regular constituted board. The choice was made by *Moore* and *Kenslaugh*, (who it was supposed at the time, represented *William*

Kelley, and was therefore authorised to join in the selecti- JUNE 1820.
on,) necessarily precluded any other of the seven commis-
sioners from acting, when it was the intention of the legis-
lature that, in the event of a selection not being duly made,
the whole, or a majority of the commissioners, might act.
The board was constituted by nomination, when, in point
of law, the persons making the election had no authority to
do so. The board being improperly constituted had no au-
thority to proceed, and their acts must be deemed void, and
if void for the want of jurisdiction, no acquiescence on the
part of those interested in the lands can give them legal
efficacy. This being the view of the court, it becomes un-
necessary to decide the other points suggested by the ap-
pellant's counsel. The court therefore think, that the opi-
nion of the court below, in the *third* bill of exceptions,
was erroneous.

Coursey
vs
Covington

JOHNSON, J. dissented, as to the opinion on the last bill
of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

COURT OF APPEALS, (E. S.) JUNE TERM, 1820.

COURSEY vs. COVINGTON.

APPEAL from *Queen-Anne's* county court. *Assumpsit*
by the appellee against the appellant. The declaration
contained four counts:—The *first* for \$250 for services ren-
dered as an overseer on the farm of the defendant, (now
appellant,) in the year 1817. The *second* for the like sum
for work and labour as an overseer, &c. in the same year.
The *third* on a *quantum meruit* for services rendered as an
overseer, &c. and the *fourth* on an *insimul computassent*.
The general issue was pleaded.

At the trial the plaintiff proved that he resided with the
defendant in the years 1816 and 1817, and produced and
read in evidence the following articles of agreement enter-
ed into between himself and the defendant, on the 30th of
December 1815, viz. "Articles of agreement made, con-
cluded and entered into, this 30th day of December 1815,
between *Edward Coursey* of," &c. "and *El-jah Covington*
of," &c. "witnesseth, that the said *Edward* for himself,

Where there is
a special contract
not under seal, for
labour or services,
and it has been
fully executed, *in-*
debitatus assump-
sit lies for the sum
stipulated by the
contract

If a contract
with an overseer
be to give him a
certain stipulated
sum, and to fur-
nish him with cer-
tain quantities of
produce, the value
of the produce, or
damages for its
non-delivery, can-
not be recovered
in an action of ge-
neral *indebitatus*
assumpsit, but the
whole may be re-
covered in a spe-
cial action on the
case

When the en-
tire contract is to
deliver certain
quantities of pro-
duce, in an action
of general *indebitatus*
assumpsit cannot

be sustained to recover the value of such produce, or damages, for its non-delivery.

Where the defendant agrees with the plaintiff to pay him, as overseer, a certain sum, and a certain
amount of produce, and the plaintiff declares only for the money, he is not entitled to recover the
value of the produce. A plaintiff may recover less than he demands, but not more.

JUNE 1820. his," &c. "doth covenant and agree to and with the said *Elijah*, his," &c. "by these presents, that he the said *Edward*, for and in consideration of the conditions herein after mentioned to be performed by the said *Elijah*, will permit the said *Elijah* to be his overseer for and during the year 1816, and will permit him to live in, occupy, possess and enjoy, the house where *J. Howard* now dwells, with the appurtenances which the said *Howard* enjoys; that he will furnish the said *Elijah* with two cows to milk, and will permit the horse of the said *Elijah* to be pastured in common with his work horses; and will furnish the said *Elijah* with reasonable food for said horse; that he will furnish and provide for the said *Elijah* seven hundred pounds of pork, and fifteen barrels of corn, and twelve bushels of good clean wheat; and that the said *Edward* will pay to the said *Elijah* his," &c. "two hundred and fifty dollars, current money, at the time the same may become due and payable to the said *Elijah*. And the said *Elijah*, in consideration of the covenants herein before mentioned to be performed by the said *Edward*, for himself, his," &c. "doth covenant and agree with the said *Edward*, his," &c. "that he the said *Elijah* will live with the said *Edward* in the house where *J. Howard* now dwells, in the character and occupation of an overseer, for and during the year 1816; and that he will well and faithfully use and exercise all his skill," &c, "on the farm, with the hands and teams of the said *Edward*, to make such crop as the said *Edward* shall direct; and in all things pursue the directions of the said *Edward*," &c. &c. Signed and sealed by both of the parties. The defendant then produced and read in evidence articles of agreement between him and the plaintiff, bearing the same date, and being similar to the articles of agreement offered in evidence by the plaintiff, except that between the words "*fifteen barrels of corn*," and the words "*and twelve bushels of good clean wheat*," the words "*for his family*" were inserted. The execution of both agreements were admitted. The defendant then proved by two witnesses, that the plaintiff kept the keys of the defendant's granary and corn-house during the year 1817, and that they resided on the farm during that year, and that the plaintiff was not restricted from taking the amount of corn and wheat to their knowledge; and then prayed the court to direct the jury, that if they

Coursey
vs.
Covington.

should believe that the contract between the plaintiff and defendant in 1817, was according to the articles last mentioned, and that the plaintiff was not restricted from taking the quantity of fifteen barrels of corn, and twelve bushels of wheat, that neither of these articles can form any consideration upon which he can recover in this action. But the court, [*Earle*, Ch. J. and *Purnell*, A. J.] refused to give the instruction as prayed for, being of opinion that the value of the articles, as such, cannot be recovered in this action, but that the jury, in estimating the damages on the *quantum meruit*, might consider the value of the plaintiff's services with, or without being provided with these articles by the defendant; and that the sound construction of the articles of contract last above mentioned, if it is believed by the jury that the contract between the parties in 1817 was according to the said articles, is that the defendant should provide fifteen barrels of corn, and twelve bushels of wheat, for the plaintiff, whether that quantity of grain was consumed in the plaintiff's family or not. The defendant excepted; and the verdict being for \$290, and judgment thereon rendered for the plaintiff, the defendant appealed to this court.

JUNE 1820.
 Coursey
 vs
 Covington

The cause was argued in this court before BUCHANAN, JOHNSON, MARTIN and DORSEY, J. by

Carmichael, for the appellant, and by

Harrison, for the appellee.

BUCHANAN, J. delivered the opinion of the court.

There is no principle better established than that, where there is a special contract not under seal, for labour or service, *indebitatus assumpsit* will lie for the stipulated price, if the contract has been fully executed; and so far as respects the two hundred and fifty dollars, the sum contracted to be paid by the appellant to the appellee, for his services as an overseer, that principle applies to this case, but no further. It is very clear, that if the terms of the contract between the parties for the year 1817, were the same as those for the year 1816, the appellee was entitled to the corn and wheat stipulated to be furnished by the appellant, whether he used any of it in his family or not; he was not bound to consume it in his family, and what he should choose to do with it was a matter in which the ap-

JUNE 1820

Coursey
vs.
Covington

pellant had no concern, but neither the value of the articles, nor damages for the non-delivery, can be recovered in general *indebitatus assumpsit*. If they were not furnished, his remedy is by a special action on the case, in which he would be entitled to recover both the money and damages for the non-delivery of the wheat and corn; and they could in no shape have properly formed a subject of consideration for the jury in estimating the damages in this cause. If in place of a money consideration the contract had been for the delivery of a stipulated quantity of wheat, or any other article, to the appellee, as a compensation for his services as an overseer, it is certain, that for a breach of the contract in the non-delivery of the wheat, &c. he could not maintain an action of general *indebitatus assumpsit*; and the reasons governing such a case apply with equal force to so much of the contract relied on in this case, as respects the furnishing of corn and wheat. Besides, the appellee, in his declaration, only goes for the two hundred and fifty dollars, the amount stipulated to be paid, and nothing else, and on no principle can he be entitled to recover more, which he would do, if the jury were permitted, in estimating damages, to take into consideration in any shape the non-delivery of the corn and wheat, contrary to the known principle that a plaintiff can never recover more than he claims, though he often may recover less. The court below, therefore erred in directing the jury, that in estimating the damages, they might consider the value of the plaintiff's services, with or without being provided with the corn and wheat by the defendant.

JOHNSON, J. This was an action on the case, brought by Covington against Coursey on the 7th April 1818, in which the plaintiff recovered \$290 on the 1st June 1819. An exception was taken to the opinion of the court, on which the cause is brought before the court of appeals.

The declaration contains 4 counts: 1. To recover \$250 for services rendered as an overseer. 2. Same sum for work and labour. 3. *Quantum meruit* for same. 4. *Insimul computassent*. Plea *non assumpsit*.

At the trial of the cause, the plaintiff, in support of the issue on his part, gave in evidence to the jury articles of agreement entered into between the plaintiff and defendant,

dated 30th December 1815, by which the defendant agreed **JUNE 1820.**
to permit the plaintiff "to be his overseer for the year 1816,
and will permit him to live and occupy, and possess, the
house where *Joseph Howard* now lives, with the appurte-
nances, which said *Howard* enjoys; that he will furnish
the said *Elijah*, (the plaintiff,) with two cows to milk, and
will permit the horse of the said *Elijah* to be pastured in
common with his work horses, and will furnish him with
reasonable food for the horse; that he will furnish and pro-
vide for the said *Elijah* 700 lbs. pork, 15 *bbls. corn*, and
twelve bushels of good clean wheat, and pay him \$250, at
the time it may become due." In consideration of the above
compensation the plaintiff agreed to serve as an overseer,
&c.

Coursey
vs
Covington

The suit was not brought to recover compensation for the
year 1816, but for 1817, the overseer having remained
there both years.

After the above agreement was read on the part of the
plaintiff, the defendant produced also an agreement be-
tween them, of the same date and tenor, except that after
the words "15 *bbls. corn*," were inserted "*for his family*,"
and twelve bushels of clean wheat.

Both agreements were admitted to have been executed.
It was proved that the plaintiff kept the keys of the gra-
nary and corn-house during the year 1817, and that the
plaintiff and family resided on the farm during that year,
and was not restricted from taking the amount of the corn
and wheat.

Upon this evidence the defendant prayed the court to
direct the jury, that if they should believe, that the con-
tract between the plaintiff and defendant in 1817, was ac-
cording to the contract as on the part of the defendant pro-
duced, and that the plaintiff was not restricted from taking
the corn and wheat, that neither of those articles can form
any consideration upon which he can recover. But the
court refused to give the instruction as prayed; being of
opinion, that the value of the articles, as such, cannot be
recovered in this action; but that the jury, in estimating
the damages on the *quantum meruit*, might consider the
value of the plaintiff's services, with or without being pro-
vided with those articles by the defendant, and that the
sound construction of the articles of agreement, produced
by the defendant, is such, that the defendant should fur-

JUNE 1820. *nish the corn and wheat for the plaintiff, whether that quantity was consumed or not.*

Coursey
vs
Covington

I agree with the court below in the construction given of the contract as produced by the defendant. But it appears to me, that they erred in the previous part of their opinion.

The suit is not brought on the special agreement, claiming not only the \$250, but a compensation for the deficiency in the corn and wheat; but is solely and exclusively brought for the \$250. Supposing the special agreement to be evidence in the cause to enable the plaintiff to recover the \$250, yet certainly under that agreement, as applied to the general counts in the declaration, he was incompetent to recover for the corn and wheat. The court were aware of this, and expressly say, that he was incompetent to recover for the *articles*, (that is, the corn and wheat,) *as such*; yet that the jury, in ascertaining the amount of the verdict on the *quantum meruit*, might consider them, and of course *increase* or *diminish* the damages, as the fact might turn out; that is, if they had been received, the plaintiff must be governed by the \$250, if not, that the value of those articles must be added to that sum; and from the amount of the verdict they were in part added.

Although, on general counts, you may give in evidence contracts executed, yet it will not follow that on such counts, claiming money alone as due, you can claim damages for the non-delivery of different articles, such as corn and wheat; and although, on general counts *for money*, you may give in evidence a special agreement establishing *the extent of the money claim*, yet it will not follow that other articles, agreed to be given in addition, to the non-delivery of which articles no complaint is made, can increase the money claim.

If they could the defendant must be constantly taken by surprise; he was bound to pay money, corn and wheat; he is sued, and the allegation is, that the money was not paid; could he possibly expect, or be prepared to meet, at the trial of the cause, a demand for the corn and wheat also?

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

COURT OF APPEALS, (E. S.) JUNE TERM, 1820. JUNE 1820.

WALKUP vs. PRATT.

Walkup
vs
Pratt

APPEAL from *Queen-Anne's* county court. The appellant petitioned the county court for his freedom, as being descended lineally in the female line, from a free woman named *Violet*. The general issue was pleaded.

1. At the trial the petitioner proved, by competent testimony, that he was the son of a woman by the name of *Tansey*, who was the daughter of *Violet*. And after he had given other evidence, not necessary to be noticed in this bill of exceptions, the defendant offered to read in evidence a commission, which issued in this cause on the 4th of May 1818, to three commissioners, residing in the state of *Delaware*, (they or either of them to act,) for the purpose of taking testimony and the proceedings under the commission. By the return of the commission it appeared that the oath annexed to the commission, was administered to one of the commissioners therein named by a justice of the peace of *Kent* county, in the state of *Delaware*, on the 9th of October 1818, and that the said commissioner on the same day, administered to the clerk, by him appointed, the oath also annexed, to be taken by the clerk. Then followed the interrogatories of the defendant, certified by the clerk of *Queen-Anne's* county court, stating that no interrogatories had been filed by the petitioner. The return by the commissioner was as follows, viz. "State of *Delaware*, *Kent* county, sc. By virtue of the annexed commission. I, *John Fisher*, one of the commissioners therein named, together with *Arthur Johns*, the clerk by me appointed, have, this ninth day of October in the year 1818, met at the house of *Aber Harris*, in the county aforesaid, at the hour of 3 o'clock in the afternoon, as by appointment and notice thereof given, and having taken the oath annexed to the said commission, a certificate whereof is hereunto annexed, proceeded to the execution of the same commission. Whereupon *Philip D. Feddeman*, a witness produced by the defendant in this commission named, being duly sworn true and perfect answers to make to all such interrogatories as to him should be put in this cause, and therein to speak the truth, the whole truth, and nothing but the truth. To the first interrogatory, this deponent answereth

The return to a commission to take testimony out of the state, was held to be well executed, altho' there was no other evidence that the person, who administered the oath to the commissioner, was a justice of the peace, than his own act, and the return of the commission.

Hearsay evidence is not admissible to prove the sale of a slave, but is admissible to establish a pedigree, and to identify the original ancestor, from whom the pedigree is deduced.

General reputation of a petitioner, or his maternal ancestors, being entitled to freedom, is not admissible in evidence.

Improper evidence having been used on one side, does not justify the same kind of evidence, if objected to, being used on the other.

A will and inventory, stating a negro to be a slave is evidence that the testator claimed title to such slave, and that she was appraised as a part of his estate.

The declarations of one of the representatives of a deceased person are not evidence against another, in a suit by that other.

The declarations of the ancestor, under whom a petitioner for freedom derives his title, are evidence against such petitioner, and are not within the act of 1717, ch. 13.

JUNE 1820

Walkup
vs
Pratt

and saith—"That," &c. Then follow the answer which the deponent signed, &c. "Taken, sworn and subscribed, this 9th of October 1818, before *John Fisher*, Comsr.

I beg leave to return to the honourable the judges of *Queen-Anne's* county court, of the state of *Maryland*, that in virtue of the annexed commission, to me directed, having first myself taken the oath aforesaid to the said commission annexed, and presented for me to take, and having also administered to *Arthur Johns*, the person by me appointed clerk of the said commission, the oath to the said commission annexed, and presented for him to take, I have caused *Philip D. Feddeman*, a witness, to be sworn, and his deposition fairly and truly to be written down, as by the said commission I am directed; all which, together with the said commission, I return closed to your honourable court, under my hand and seal, this 9th day of October 1818, as by the said commission I am directed.

John Fisher, Comr. (S. L.)"

To the reading of which the petitioner objected, alleging, that it did not appear, upon the face of the commission and return, that it was sufficiently executed and authenticated to go in evidence to the jury. But the court, [*Earle*, Ch. J. and *Worrell*, A. J.] were of opinion that it was sufficiently authenticated, and permitted it to be read in evidence to the jury. The petitioner excepted.

2. The defendant then offered to read the deposition of the witness, as returned under the above commission, but the petitioner objected to that part in which the witness states, "that *Violet*, as he understood from his said mother and sister, was the daughter of a negro woman who had been purchased by the deponent's grandfather, *Philip Feddeman*, from a *Mr. Sherwood* on the bay side in *Talbot* county. Deponent saith, that the name of the said negro woman, purchased by his grandfather, from said *Sherwood*, was *Rose*, or *Violet*." It was admitted that the mother and sister of the deponent were both dead before the deposition was taken. But the court were of opinion, that though this testimony was not competent as testimony to prove the sale, that it was competent and proper, as descriptive of the person of *Violet* or *Rose*. The petitioner excepted.

3. The defendant then proved by *P. Feddeman*, that *B. Feddeman* was his uncle, and that he had lived in early

life in *Tuckahoe*, in his neighbourhood, where he knew *June 1820.*
him well; that he afterwards removed to *Queen-Anne's*
county, and knew *C. C. Ruth*, and lived for several years
in his neighbourhood, and was well acquainted in his fa-
mily. The defendant then asked the witness if he had
ever heard in the neighbourhood, of *B. Feddeman* and *C.*
C. Ruth, that the woman *Violet*, or her children, were en-
titled to freedom? to which he answered, without any ob-
jection on the part of the petitioner, he had not. The de-
fendant then proved by *J. R. Pratt*, that he was related to
the late *C. C. Ruth*, and that when a boy was often in his
family; that in 1768 he knew *Violet*, and her three chil-
dren *Sam*, *Lilly* and *Tansey*, and that *Sam* was 9 years
old, *Lilly* two years younger, and *Tansey* younger than
the others. The petitioner then asked the witness, (*Pratt*,)
if he had ever heard in the neighbourhood, of *C. C. Ruth*,
that *Violet*, and her children, were entitled to freedom?
The defendant objected to this testimony going to the
jury; and the court sustained the objection. The petition-
er excepted.

Walkup
vs
Pratt

4. The defendant then read in evidence the will of
P. Feddeman, dated the 5th of January 1733, in which he
bequeathed two mulatto slaves, namely *Violet* and *Davy*,
to the child his wife was then big with, to be delivered
when the said child came of age. He also bequeathed mu-
latto *Rose* to his wife. And in the inventory returned on
his estate in 1735, wherein a negro woman named *Rose*,
aged 17 years, and a negro girl named *Violet*, aged 9 years,
are mentioned and appraised. The defendant claimed the
petitioner as his slave, and deduced his title from the said
P. Feddeman. The petitioner then prayed the court to di-
rect the jury, that the will and inventory of the said *Fedde-*
man are not competent and admissible to prove that *Vio-*
let, from whom the petitioner claims freedom, was a slave.
Which opinion the court refused to give, and instructed
the jury, that said will and inventory were competent and
admissible evidence, and should be weighed by the jury as
such, to prove that *Violet* was the slave of the said *P. Fedde-*
man. The petitioner excepted.

5. The defendant then read in evidence the will of his
grandfather, *C. C. Ruth*, dated the 17th of February 1775,
whereby he devised and bequeathed to his cousin *Henry*

JUNE 1820. *Pratt*, and his heirs and assigns for ever, the whole residue and remainder of his estate, real and personal, after deducting the several legacies and bequests therein before mentioned and given. And also the inventory returned on his estate in 1776, in which a mulatto woman named *Violet*, 53 years old, a mulatto girl named *Lilly*, 14 years old, and a mulatto girl named *Tansey*, 9 years old, are mentioned and appraised. The defendant claimed the petitioner as his slave, and deduced his title from his father, *Henry Pratt*, who died in the year 1809, which *H. Pratt* was the devisee mentioned in the will of *C. C. Ruth*. The petitioner then prayed the court to direct the jury, that the will and inventory of the said *Ruth* were not competent and admissible to prove that *Violet*, from whom the petitioner claimed his freedom, was a slave. Which opinion the court refused to give, but instructed the jury, that said will and inventory were competent and admissible evidence, and as such should be weighed by the jury, to prove that *Violet* was the slave of *C. C. Ruth*. The petitioner excepted.

6. The petitioner proved by a witness, that she (the witness) went into the family of *C. C. Ruth* to reside, when she was about 10 years of age, and continued to reside there generally 'till the death of Mr. *Ruth*, and of Mrs. *Ruth*. That in the life-time of Mr. and Mrs. *Ruth*, the witness was in Mrs. *Ruth's* lodging room, and Mr. *Ruth* came in when Mrs. *Ruth* made complaints of *Violet's* conduct. Mr. *Ruth* listened to them, and said, *Becky*, no one can please you; but I cannot beat *Violet*, for she is as free as you or I. The petitioner then proposed to prove by the same witness, that after the death of Mr. *Ruth*, she heard Mrs. *Ruth* say, that *Henry Pratt*, the legatee, proposed to her to take as part of her thirds of the personal estate of *C. C. Ruth*, one of *Violet's* children, and that she refused to take any of them, and told *Henry Pratt* that she would not, for that he, *Pratt*, knew that *Violet's* children were free. To this testimony the defendant objected; and the court sustained the objection. The petitioner excepted.

7. The defendant then proved by a witness, that she the witness, was 72 years old; that she knew Doctor *Kitteridge* very well when she was young, and a yellow woman by the name of *Violet*, in the possession of *Kitteridge*; that she expects she was then a young woman, but does not know. And proposed to prove by the same wit-

ness, that when she was young, and whilst the said *Violet* was in the possession of Doctor *Kitteridge*, she, the witness, had a conversation with *Violet*, and that she then acknowledged herself to be a slave—that her mother was a black woman, and her father a white man. To this testimony the petitioner objected as being incompetent. But the court thought the testimony both competent and proper, and permitted it to go to the jury. The petitioner excepted.

WALKUP
vs
PRATT

8. The defendant then prayed the court to direct the jury, that if they should be of opinion that *Violet* was bequeathed by *P. Feddeman* as a slave, and was appraised in his inventory as a slave, and that *B. Feddeman*, to whom she was bequeathed, came of age after the year 1752, and sold her to Doctor *Kitteridge*, and that she is the same *Violet*, and is the ancestor of the petitioner, that the jury are bound to find for the defendant. To which the petitioner objected; and the court gave this instruction to the jury—That if, from the testimony, they are of opinion that the petitioner is the descendant of the woman *Violet*, devised by *P. Feddeman* to his son *B. Feddeman*, and at the death of the testator, *Violet* was a slave, they are bound to find a verdict for the defendant. The petitioner excepted. And the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, JOHNSON, MARTIN and DORSEY, J. by

Carmichael and *Hopper*, for the appellant, and by

Chambers and *Harrison*, for the appellee.

MARTIN, J. delivered the opinion of the court.

The petitioner in this cause claims his freedom as being descended from a free woman named *Violet*.

In the trial of the cause below, several bills of exceptions were taken to the opinions given by the court, and whether those opinions are erroneous, it is now our duty to determine. The *first* bill of exceptions having been abandoned by the counsel for the petitioner, it is unnecessary to be considered by this court. The opinion expressed in that exception is of course concurred in.

The court are of opinion, that the opinion of the court below, in the *second* bill of exceptions, was correct. The

JUNE 1820. testimony offered being hearsay testimony, certainly was not competent to prove a sale from *Sherwood* to *Feddeman*; but pedigree may be proved by this kind of evidence, and pedigree can never be satisfactorily established, unless you are permitted to identify the ancestor. In cases of petitions for freedom, it would be nugatory to permit the petitioner to prove his descent through a long line of ancestry by hearsay evidence, if at the same time you withheld the privilege of identifying the ancestor from whom the pedigree is attempted to be traced; such evidence therefore, as descriptive of the person, for the purpose of identifying the ancestor, is admissible. The opinion expressed in the *second* bill of exceptions is concurred in.

Walkup
vs
Pratt

With respect to the *third* bill of exceptions, the court are of opinion there is no error. A witness in a petition cause for freedom, cannot be asked whether it is the general reputation of the neighbourhood, that the petitioner, or his or her maternal ancestors, were free negroes, and may be entitled to their freedom, either because of their descent from a free woman, or being manumitted by deed or will; and the general reputation relied on, may be founded upon a supposed claim arising under a will or deed, which ought to be produced at the trial, and the construction of which would solely belong to the court. Upon this subject conflicting decisions have certainly been made. In the cases referred to in the reports of *Harris & M'Henry*, such evidence was received by the court. It was, however, refused by the Supreme Court of the *United States*, in the case of *Mima Queen, and child, vs. Hepburn*, reported in 7th *Cranch*, 290; and in the case of *Henry Helmsley*, and others, against *Walls*, decided by this court at *June* term 1817, such testimony was rejected upon the principles before stated, and the court have no reason to be dissatisfied with that decision. It has been contended for the petitioner, that if this testimony was improper upon *general* principles, that it was rendered admissible by the previous examination by the appellee. If the counsel for the appellee had offered improper evidence, the court, on application, would have rejected it, but the offering improper evidence by one of the litigant parties, never can justify the introduction of similar evidence by the other party; such doctrine would lead to endless confusion, and destroy all the established rules of evidence. The opinion in this exception is concurred in.

The court are of opinion, that the county court erred in JUNE 1820. their opinion expressed in the *fourth* bill of exceptions. The will and inventory set forth in this exception were legal and competent evidence to prove, that *Feddeman* claimed title to *Violet*, and bequeathed her, and that she was appraised as part of his effects, and the court below ought to have declared such to have been their legal effect; instead of this, they generally directed the jury that the will and inventory were competent and admissible evidence, and ought to be weighed as such, to prove *Violet* was the slave of *Philip Feddeman*. This general direction might have misled the jury, and was therefore erroneous. The same objection applies to the *fifth* bill of exceptions. The opinions expressed in those exceptions are dissented from.

Walkup
vs
Pratt

The court concur in the opinion expressed in the *sixth* bill of exceptions. The reasons assigned for concurring in the opinion expressed in the *third* bill of exceptions, apply with equal force to this, nor can the court perceive the inconsistency, (as contended for by the counsel for the petitioner,) between the opinions of the court below in the *second* and *sixth* bills of exceptions. In the *second* bill of exceptions the testimony was offered to prove *pedigree*, and *identify the ancestor*, and for that purpose was competent and proper; in the *sixth*, it was offered to prove *generally*, that *Violet's* children were free, and was subject to the objections before stated to the *third* exception. But it has been attempted to overrule the judgment in this exception, on the ground of interest in Mrs. *Ruth*, whose declarations were offered in evidence; and the position has been assumed, that wherever there is such an interest as would prevent the person from being a witness, the declarations of that person may be given in evidence by the opposite party. This position, however, cannot be sustained; for many instances may be adduced, where a person would be inadmissible as a witness, from interest, and yet his declarations would not be evidence. The bail of the defendant in a suit cannot be a witness from his interest; yet it is believed it never was attempted to offer his declarations to sustain the action. So also of security for costs, and many other cases that are not necessary to be mentioned. It must be observed in this case, that the defendant does not claim title to the petitioner from Mrs. *Ruth*; against her, and those claiming under her, the testimony might be

JUNE 1820. proper; but although she had an interest in part of *Christopher Ruth's* estate, her declarations could not be received in evidence to defeat the interest of those who claim the residue of that estate. It would be a dangerous doctrine to permit one representative of a deceased person, however small his interest might be in the estate, and who was no party to the suit, to defeat, by his declarations, the rights of all others claiming under the same estate. This, however, does not appear to be a new case; for in the notes to *Peake on Evidence*, page 24, several decisions are referred to on this point. It is there stated, that the confessions of one interested in the event of a suit, but not a party, cannot be given in evidence. So in 1 *Root*, 502, the declarations of one co-obligor, not sued with the defendant, are not evidence; and in *Mass. Reports*, 71, "an opinion said to have been expressed by one of the devisees, is not admissible to prove the testator was insane."

Walkup
vs.
Pratt.

The court are also of opinion, that the opinion of the court below, as expressed in the *seventh* bill of exceptions, ought to be concurred in. The declarations of *Violet*, the ancestor from whom the petitioner claims his freedom, was proper evidence to be submitted to the jury. The objection arising under the act of 1717, *ch. 13*, relied on by the counsel, cannot be sustained, the case is not within either the letter or spirit of that act, nor can it have any influence or operation upon it.

It is not necessary to consider the legal effect of the second objection raised by the counsel, in the argument of this exception, that the declarations of *Violet* ought not to be received in evidence, because the petitioner did not claim freedom from her, but paramount to her; because, from an examination of the record, the fact will be found to be otherwise. No attempt whatever was made by the petitioner to prove a title to his freedom, paramount to *Violet*; on the contrary, he claims his freedom as being the son of *Tansey*, who was the daughter of *Violet*, a free Indian woman; and not a tittle of testimony was offered by the petitioner to trace his title to freedom to a more remote ancestor.

The *eighth* bill of exceptions having been abandoned by the counsel for the petitioner, the opinion expressed in that exception is concurred in.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

COURT OF APPEALS, (E. S.) JUNE TERM, 1820. JUNE 1820.

NEGRO WILLIAM *vs.* KELLY.

William
vs
Kelly

APPEAL from *Somerset* county court. The appellant, (the petitioner in the court below,) filed his petition against the appellee for his freedom. The following case was stated for the court's opinion, viz. That the petitioner was the slave of *L. Goslee*, deceased, who in his life-time was possessed of a considerable real and personal estate; and being so possessed, on the 13th of September 1808, by his will, amongst other things, bequeathed as follows: "*Item.* I give and bequeath to all my negroes their freedom; that my heirs, executors, nor administrators, shall have no right nor title to them after they arrive at the ages hereafter mentioned—the males at twenty-eight years of age, and the females at twenty-five years of age, according to the ages in my book." That *E. Goslee*, the widow of *L. Goslee*, renounced the devises and bequests in the said will mentioned, and agreed to take her thirds of the said estate, as allowed by law. That some time afterwards she intermarried with the defendant. That *L. Goslee*, the testator, left personal estate, exclusive of his negroes, more than sufficient to pay all the debts due by him, and that the said debts have been all paid. After which, to wit, on the 14th of January 1817, the orphans court of *Somerset* county appointed C. J. and W. M. to divide and make distribution of the negroes mentioned in the said will, between the defendant and his wife, and the children of *L. Goslee*; and that C. J. and W. M. on the 20th of January 1817, made a distribution and allotment of the said negroes accordingly. That the petitioner was a part of the allotment made to the defendant in right of his wife, and that he accepted and received the petitioner as a part of the said allotment so made to them, and that the petitioner was and is claimed by the defendant as a slave for life. That the petitioner, on the 10th of March 1819, arrived to the age of 28 years, according to the ages in the testator's book, and is of a sound healthy constitution, and able to get his living, and to support himself by labour. The county court rendered judgment on the case stated for the defendant, and the petitioner appealed to this court.

If the personal estate of a deceased, after the payment of his debts, is not sufficient to compensate his widow for her thirds, negroes bequeathed to be free, may be allotted to her as slaves for life.

JUNE 1820. The cause was argued at this term before BUCHANAN, EARLE, JOHNSON and DORSEY, J. by

Ward
vs.
Howell,

J. Bayly, for the appellant; and by

Bullitt, for the appellee.

THE COURT OF APPEALS affirmed the judgment of the county court.

COURT OF APPEALS, (E. S.) JUNE TERM, 1820.

WARD vs. HOWELL, et al.

The admissions of one partner after the partnership is dissolved, are not sufficient to charge the other partners with a debt, but are sufficient to take such a debt out of the statute of limitations.

APPEAL from *Cecil* county court. This was an action of *assumpsit*, brought by the appellees against the appellant, and *Chandler* and *Raisin*, to recover the sum of \$188 43, alleged to be due by them as partners. By the case stated, on which the judgment was rendered, it appears that a co-partnership existed between the appellant, and *Chandler* and *Raisin*, until the fall of the year 1814, when it was dissolved, and the dissolution known to the appellees. On the 17th of August 1815, *Raisin*, who had been one of the firm, signed the following paper:

“\$188 43 *Baltimore*, 17th Augt. 1815.

On settlement of the whole accounts of the *Philadelphia* packets, we acknowledge a balance due Mr. *Howell* and son, of one hundred and eighty-eight dollars and forty-three cents. There are yet uncollected accounts to the amount of ninety-six dollars and fifty-seven cents, which, when collected, will be placed to our credit. We are credited with \$60 on account of a day, in the account now settled, which, should it appear hereafter to have been credited, shall be paid.

(Signed)

Philip F. Raisin

for the late firm of *Francis B. Chandler, & Co.*

Approved by

Wm. Howell & Son.”

The plaintiffs below, the present appellees, produced no other evidence, and judgment being rendered for them, *Ward* appealed to this court, where the cause was argued

at this term, before BUCHANAN, JOHNSON, MARTIN and JUNE 1820.
DORSEY, J.

The only question was, whether the admissions of one partner, after the partnership is at an end, are evidence against the rest of the partners.

THE COURT were of opinion, that the evidence was not sufficient to charge the partnership with a debt, though it would be sufficient to take such a debt out of the statute of limitations.

JUDGMENT REVERSED.

Morgan
vs.
Blackiston

COURT OF APPEALS, (E. S.) JUNE TERM, 1820.

MORGAN vs. BLACKISTON.

APPEAL from *Kent* county court. It was an action of debt on a bond dated the 13th of April 1802. Judgment was given by the court below for the defendant, on a case stated. The facts agreed upon were, that *Morgan*, the plaintiff, at the *April* term 1801, of the late General Court, obtained a judgment on a bond against one *Samuel Davis*, for penalty and costs, to be released on payment of \$2200, with interest from the 24th of November 1796, till paid, and costs. Payments were to be allowed, and there was a stay of execution until the 1st of January 1802. That *Davis*, together with the present defendant, and another person, as his securities, afterwards executed the bond on which the present action was brought. This bond was in these words:

“Know all men by these presents, that we, *Samuel Davis*, *John Comegys* and *Lewis Blackiston*, all of *Kent* county, in the State of *Maryland*, are held and firmly bound unto *Benjamin R. Morgan*, of *Philadelphia* county, State of *Pennsylvania*, in the sum of sixteen hundred and fifty pounds, current money, to be paid to the said *Benjamin R. Morgan*, or his certain attorney, executors, administrators or assigns; to which payment well and truly to be made and done, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this 13th of April 1802. Whereas the above bound *Samuel Davis* is about to obtain an injunction out of the High Court of Chancery of the State of *Maryland*, to stay proceedings at

An injunction bond is only binding with reference to the judgment it recites, and is a security for the payment of no other judgment than the recited one; as where the judgment recited was stated to have been at *April* term 1801, when it was in fact at *September* term 1801, it was held that the bond was not liable.

JUNE 1820

Morgan
vs.
Blackiston

law on a judgment rendered against him in the General Court for the Eastern Shore of Maryland, at September term 1801, at the suit of said *Benjamin R. Morgan*, for the sum of *eight hundred and twenty five pounds, current money, debt, and costs of suit*. Now the condition of the above obligation is such, that if the said *Samuel Davis* shall prosecute the said writ of injunction with effect, and satisfy and pay, as well the said debt of eight hundred and twenty-five pounds, as also all costs, damages and charges, that shall accrue in the chancery court, or be occasioned by the stay of execution on the said judgment, unless the court of chancery shall decree to the contrary, and shall in all things obey such order and decree as the chancery court shall make in the premises; then the above to be void, else to remain in full force, &c.

Samuel Davis, (Seal.)

John Comegys, (Seal.)

Lewis Blackiston, (Seal.)

Attested, *John D. Heath*."

It was also admitted, that *Davis*, on the 10th of April 1802, filed a bill in chancery against *Morgan*, and obtained an injunction the same day to stay proceedings on the judgment recited in the bond. That *Morgan* appeared to and answered the bill; and a motion to dissolve the injunction was heard by the chancellor at February term of that court 1803, and overruled, and the injunction continued. No further proceedings were had in the court of chancery until July term 1809, when it was entered *abated*, by the chancellor, in consequence of the death of *Davis*, which happened about the 15th of May preceding. It was also admitted, that letters of administration were taken out on *Davis's* estate by one *Isaac Spencer*, on the 21st of August 1809, and that no bill of revivor in said chancery cause had ever been filed by the administrator, or by any other person, or any other proceedings had in the same. Judgment being, as before stated, for the defendant, the plaintiff prosecuted the present appeal.

The case was argued in this court at the present term, before BUCHANAN, JOHNSON, MARTIN and DORSEY, J. by

Tilghman, for the appellant, (a) and

Carmichael, for the appellee.

(a) He cited 1 *Bac. Ab. tit. Condition*, 682. 2 *Com. Dig.* 450, and 1 *P. Wms.* 743.

THE COURT was of opinion, that the bond, on which **JUNE 1820.** the action was brought, could not be made to embrace any other judgment than the one it recited; and as the judgment admitted by the case stated to have been obtained by the appellant against *Davis*, was rendered at *April* term 1801, of the general court, and the one recited in the bond is of *September* term 1801, they thought the judgment below ought to be affirmed.

Kennedy
vs.
Fowke

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1820.

KENNEDY vs. FOWKE.

APPEAL from *Charles* county court. It was an action of replevin, and the defendant, in the court below, (the present appellee,) avowed the taking the property as a distress for two years rent in arrear, for a store house and premises. The plaintiff pleaded to the avowry, no rent in arrear, upon which issue was joined. At the trial, the avowant gave evidence, that a written paper, or agreement, for renting the premises in the avowry stated, was sent and submitted to the avowant by the plaintiff, assented to by the avowant, and returned and left in the desk of the plaintiff in his store; and she then offered to prove the contents of said paper. The plaintiff objected to the admissibility of the evidence, and to the contents of the said paper being proved, as no notice had been given to the plaintiff to produce it. But the court, [*Gantt*, Ch. J.] overruled the objection, and allowed the evidence to be given to the jury. The plaintiff excepted; and the verdict and judgment being for the avowant, the plaintiff appealed to this court.

Proof cannot be given of the contents of a paper in the possession of the opposite party, unless notice has been given to him to produce it.

Chapman, for the appellant, cited *Peake's Evid.* 8, and *Lofft's Gilb.*

C. Dorsey, for the appellee.

THE COURT OF APPEALS reversed the judgment of the county court, and awarded a *procedendo*.

JUNE 1820.

COURT OF APPEALS, JUNE TERM, 1820.

Mark

vs

Lawrence.

MARK vs. LAWRENCE.

An action may be supported against a deputy sheriff for malfeasance, not in his capacity of deputy sheriff, but as a wrong doer.

If a deputy sheriff in selling goods under a *fieri facias*, commits a fraud, and the plaintiff in the judgment, on which the *fi fa* issued, is satisfied his debt, an action of trover may be sustained by the defendant in such judgment for the goods against the deputy sheriff, as a wrong doer.

Whether there has been such fraud, is a question of fact for the decision of the jury. A deputy sheriff, by purchasing at his own sale, commits a fraud.

APPEAL from *Frederick* county court. An action of *trover* was brought by the present appellee. The declaration contained two counts; the first, a count in *trover* in the usual form; and the other a special count against the defendant below, (now appellant,) as deputy sheriff, stating the whole case, viz. "And whereas also, on the, &c. there issued out of *Frederick* county court a certain writ of *fieri facias*, directed to the then sheriff of the said county, reciting—That whereas at a county court begun and held on, &c. at, &c. a certain *John Dill*, by judgment of the same court, recovered against a certain *Joseph W. Lawrence*, [the plaintiff in the court below, and appellee in this court,] as well the sum of," &c. [reciting the judgment.] "Therefore the said sheriff was commanded, that of the goods and chattels, lands and tenements, of the said *J. W. L.* being in his bailiwick, he should cause to be levied the debt, &c. and that he should have those sums of money, &c. On which said writ there was written a certain endorsement, as follows, to wit: To be released on payment of \$104 current money, with interest, &c. That the said writ was afterwards, &c. delivered to the then sheriff of *Frederick* county, to be executed; by virtue of which said writ, the said then sheriff afterwards, &c. as sheriff, seized and took in execution divers goods, &c. of the said *J. W. L.* then and there found, and being of a large value, to wit: One negro woman called, &c. of the value of, &c. one negro girl, &c. and one negro girl child, &c. And the said *J. W. L.* avers, that at the several times hereinafter mentioned, the said *John Mark*, [the defendant in the court below, and appellant in this court,] was the deputy of the then sheriff aforesaid, by him lawfully appointed; and so being the deputy, he the said *J. M.* was afterwards, to wit, on, &c. at, &c. authorised by the then sheriff aforesaid, as his deputy, to sell the said goods, &c. of the said *J. W. L.* or as much thereof as would make the said sum of money mentioned in the indorsement of the writ of *fieri facias* aforesaid; yet the said *J. M.* well knowing the premises, but minding and fraudulently intending to deceive and defraud him the said *J. W. L.* altogether refused and neglected to sell the said negroes, as it was his duty to do; and in

order to secure to him the said J. M. the benefit and advantage of the said goods, &c. afterwards, to wit, on, &c. at, &c. falsely and fraudulently pretended to sell the said negroes to a certain *Joab Waters*, for the sum of \$210; and the said J. M. under colour of the said pretended sale, fraudulently contrived to hold the said negroes in his possession, and to receive the use and benefit thereof; and afterwards, to wit, on, &c. at, &c. sold and converted the same to his own use; whereby he the said J. W. L. is injured, and hath wholly lost the said goods and chattels, to the damage of the said J. W. L. the sum of \$2,000 current money; and therefore he brings his suit, &c." The defendant pleaded the general issue.

Mark
vs
Lawrence

1. At the trial of the cause in the county court, at August term 1813, the plaintiff offered in evidence a writ of *fiery facias*, issued out of the said court on the 18th of August 1809, on a judgment obtained in that court by *John Dill*, against him the plaintiff, for \$200 current money, damages, and 371lbs. of tobacco, costs, endorsed, to be released on payment of \$104, with interest from the 11th of January 1808, and costs; which *fiery facias* was returned by the sheriff, *satisfied plaintiff*. The plaintiff also offered in evidence, that the said writ came to the hands of the sheriff, and that he seized and took the negroes as are mentioned in the second count of the declaration in this cause; that the said *John Mark*, (the defendant,) was the deputy sheriff, and authorised to sell the said negroes, as is also stated in the said declaration. That the said negroes were the property of the plaintiff, as mentioned in the said second count of the declaration. That on the day appointed for the sale of the said negroes, the defendant set up the said negroes all together, and refused to offer them separately, for sale, and that the whole of them was struck off to *Joab Waters*, for the sum of \$210. That *Waters* was not in truth the purchaser, but only colourably, and that he bid for them for the defendant, who thereupon took them into possession as his own, and a few days afterwards sold them to one E. B. for \$360. The defendant then offered evidence, that the said sale was conducted fairly; and then prayed the opinion of the court, that upon the evidence above stated, the plaintiff was not entitled to recover; which opinion the court, [*Shriver and Nelson, A. J.*] gave. The plaintiff except-

JUNE 1820.

Mark
vs
Lawrence

ed; and the verdict and judgment being against him, he appealed to this court.

The case was argued in this court at December term 1815, before BUCHANAN, NICHOLSON, EARLE, JOHNSON and MARTIN, J.

Taney, for the appellant. He cited 1 *Chitty's Plead.* 73, 74. *Lane vs. Cotton and Franklin*, 1 *Ld. Raym.* 646, and 1 *Salk.* 17, S. C.

Pigman, for the appellee.

BUCHANAN, J. delivered the court's opinion.

In the opinion of the court, an action may be supported against a deputy sheriff for malfeasance, not in his capacity of deputy sheriff, but as a wrong doer. If therefore the appellee in this case was guilty of a fraud in the sale and purchase of the negroes in question, which was a matter to be determined by the jury, the appellant is clearly entitled to recover on the count in trover.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

The proceedings were accordingly remitted to the county court for a new trial, and the cause was again tried in that court, at October term, 1817.

2. The plaintiff gave the same facts, &c. in evidence as are stated in the preceding bill of exceptions; and the defendant then offered in evidence sundry accounts for officers fees which came to his hands for collection, the amount of which, (£18 10 10,) was levied with the said *fieri facias* on the said negroes; and that a regular appraisement of the negroes was made, amounting to \$280; that advertisements, dated the 5th of September, 1809, in which the negroes are mentioned, were set up by the defendant, five days previous to the day of sale, at the tavern of a *Mr. Wagers*, in the town of *New-Market*, in the neighbourhood of the plaintiff, notifying that there would be sold for cash, on the 11th instant, at the dwelling-house of the plaintiff, one negro woman and two children, &c. taken as the property of the plaintiff, by virtue of the before mentioned *fieri facias*, and on a distress for fees, and that the sale would commence at 9 o'clock. He also proved, that he had paid over to the sheriff the officers fees and money collected on the *fieri facias* and distress; and

further proved by *John Dill*, the plaintiff in the said *fiere facias*, that on the day of the sale by the defendant, he, the witness, attended for the purpose of buying the negroes; that he and a *Mr. Filemier*, agreed to purchase them jointly; that he bid several times for them, until he thought he had offered as much as they were worth; that *Joab Waters*, for the defendant, bid \$210. That the sale began between 9 and 10 o'clock in the morning, and continued until near 12 o'clock. That after *Waters* bid the \$210, the defendant continued to cry them for some time, warning bidders and buyers in the usual way; that there were about 15 or 20 persons at the sale, and that the whole sale was conducted fairly, and the negroes struck off to *Waters*, who was the highest bidder. The defendant also proved by the same witness, that an advertisement, like the one before mentioned, was put up at his tavern in *Frederick-town*, some days previous to the day of sale. The plaintiff then prayed the court to direct the jury, that if they believed the evidence, they must find a verdict for the plaintiff. Which direction the court, [*Shriver* and *T. Buchanan*, A. J.] gave. The defendant excepted; and the verdict and judgment being against him, he appealed to this court, where it was argued at this term before *EARLE, JOHNSON* and *DORSEY, J.*

Mark
vs.
Lawrence

Figman, for the appellant, cited *Cameron vs. Reynolds*, *Cowp.* 403. *Sanderson vs. Baker and Martin*, 2 *W. Blk. Rep.* 832. *Ackworth vs. Kempe*, *Doug.* 41, 42. *Woodgate vs. Knatchbrill*, 2 *T. R.* 154. *Chitty's Plead.* 73, 74. 6 *Bac. Ab. tit. Trover*, 677, 707. *Rex vs. Woodward*, 1 *Ld. Raym.* 736. *Ekins vs. Smith*, *Sir T. Raym.* 336.

Taney, for the appellee, relied on the same authorities he referred to at the first argument in this court.

EARLE, J. The court consider this to be the same as the case formerly before them.

JUDGMENT AFFIRMED.

JUNE 1820.

COURT OF APPEALS, JUNE TERM, 1820.

Heighe
vs
Farmers Bank

HEIGHE *et al.* vs. THE FARMERS BANK OF MARYLAND, for
the use of FRAZIER.

Where a bill is filed to vacate a fraudulent deed, and the fraud consists in the grantor's making the conveyance to protect the property from a debt due by him, on a promissory note given by him, & endorsed to the complainant, and the debt is subsequently paid to the complainant by the endorser, the bill cannot be carried on for the use of such endorser, but will be dismissed without prejudice.

The endorser may, perhaps, by a bill in his own name, afterwards set aside the deed, and recover the amount paid by him to the first complainant

APPEAL from the court of chancery.

The cause was argued at this term before BUCHANAN, EARLE, JOHNSON and DORSEY, J. by

Winder, for the appellants, and by

Boyle, for the appellees.

The case is sufficiently stated in the court's opinion.

EARLE, J. delivered the opinion of the court.

The *President, Directors and Company, of the Farmers Bank of Maryland*, filed the bill in this case, to cancel a deed from *John M. Heighe* to *James Heighe*, which deed, the answers of the defendants acknowledge to have been fraudulently made, to defeat the claim stated to be due from *John M. Heighe* to the bank. The claim was due on notes, on which suits had been prosecuted to judgments against *John M. Heighe*, endorsed by *Solomon Frazier* to the bank, and at the time of filing the bill, (1st June 1814,) was in part paid by him, although by far the greater part of the debt was then still due to the bank. From receipts filed in the cause by the complainant's solicitor, it appears that this balance was paid in 1815, and the bank's claim on the judgments entirely satisfied. The money was paid by *Josiah Bayly*, Esquire, without stating in the receipts from whom he received it, and it is doubtful whether he collected it from *Solomon Frazier* or not; assuming it, however, as proved, that all the money was paid by the endorser, *Solomon Frazier*, the court cannot be of opinion it will avail him on this occasion. The full payment to the bank put an end to this suit, and it could not be further prosecuted for his use; although if he paid the money in truth, this circumstance may possibly put him in the place of the bank, and enable him, at a future time, to set aside the fraudulent deed, and recover his money. The court decide, that the decree of the court of chancery be reversed, and the bill dismissed without prejudice.

DECREE REVERSED, &c.

COURT OF APPEALS, JUNE TERM, 1820.

JUNE 1820.

PURL'S *Lessee* vs. DUVAL.Purl
vs.
Duvall

Where a sheriff seizes property under a *fi. fa.* and returns it unsold for want of buyers and goes out of office, the *venditioni exponas* must be issued to him, and not to his successor; and if issued to his successor, all his acts under it are void.

An execution is never supposed to be issued by the authority of the court, except where it might properly issue.

APPEAL from *Prince-George's* county court. The plaintiff in that court, (the present appellant,) brought an action of ejectment to recover part of a tract of land called *Magruder's Plains Enlarged*, which was described by courses and distances, and as containing 100 acres of land. The defendant, (now appellee,) took general defence, and the general issue was joined. At the trial the plaintiff offered in evidence a grant of the land called *Magruder's Plains Enlarged*, to *John B. Magruder*, on the 10th of November 1795, for 902 acres, being a resurvey on *Magruder's Plains*, granted to *James Magruder* on the 28th of October 1706, for 857 acres. He also offered a deed from *John B. Magruder*, the grantee, to *Daniel Purl*, the lessor of the plaintiff, for the land mentioned and described in the declaration, being part of *Magruder's Plains Enlarged*, containing 100 acres, dated the 4th of June 1810. The defendant then offered in evidence the docket entries of a judgment in *Prince-George's* county court, obtained by *John B. Magruder* against *Daniel Purl*, the lessor of the plaintiff, at September term 1806, for \$1440, and costs, to be released on payment of \$720, with interest thereon from the 6th of December 1802, and costs. He also offered a writ of *capias ad satisfaciendum*, issued on the said judgment on the 13th of December 1806, and that the said *ca. sa.* was returned *Cepi* by the sheriff of the said county; and the docket entries relating to the said *ca. sa.* from the judicial docket of April term 1807, stating that the *ca. sa.* was entered, *not called by consent*, and the defendant therein credited with a payment of \$340 on the 17th of April 1807. He further offered a second writ of *capias ad satisfaciendum*, issued on the said judgment the 25th of August 1807, which was also returned *Cepi* by the said sheriff; and the docket entries relating thereto from the judicial docket of September 1807, stating that the said execution was entered, *not called by consent*. He also offered a writ of *feri facias*, issued on the said judgment the 7th of December 1807, and returnable at April term 1808; and the return made on said *feri facias* by *Notley Maddox*, then sheriff of the said county, viz. "Made to amount of \$214 72. Plaintiff's attorney satisfied for the same. Laid at

JUNE 1820

Purl
vs
Duvall

per schedule for residuē, and not sold for want of buyers.” Also the schedule above referred to, viz. “A schedule of property of *Daniel Purl*, taken in execution by virtue of a writ of *fieri facias* issued out of *Prince-George’s* county court, at the suit of *John B. Magruder*—appraised by us the subscribers this 25th day of March 1808.

“Part of a tract or parcel of land called *Magruder’s Plains*, containing 81 acres, at \$8 per acre,

\$648

Saml. Dadson, (Seal.)

Josias Furgerson, (Seal.)

John Soper, (Seal.)

his

Stephen X Whitmore, (Seal.)
mark

“A schedule of the property of *Daniel Purl* taken into execution at the suit of *John B. Magruder*, viz. One horse, 2 cows, and all the household furniture.” Also a writ of *venditioni exponas*, issued on the 17th of September 1810, returnable to April term 1811, and directed to *Notley Maddox*, late sheriff of *Prince-George’s* county, commanding him to expose to sale the above mentioned “part of a tract or parcel of land called *Magruder’s Plains*, containing 81 acres, two cows, and all the household furniture,” so as aforesaid taken by him on the said writ of *fieri facias*, &c. which said writ of *venditioni exponas* was by the said *Maddox* returned, “not sold for want of buyers.” He then offered a second writ of *venditioni exponas*, issued on the 23d of June 1812, returnable to September term 1812, and directed to the sheriff of the said county, commanding him to expose to sale the land and property as above named and described. Which last mentioned writ of *venditioni exponas* was returned by the sheriff of the said county, thereon endorsed: “Made. *John Darnall*, sheriff.” The defendant also gave in evidence the advertisement, or notice given, of the sale under the said last mentioned *venditioni exponas*, viz. “Notice. By virtue of a writ of *vend. expo.* issued out of *Prince-George’s* county court, also two from a single magistrate, to me directed, will be offered at public sale, to the highest bidder, for ready cash, on Friday the third of July, all the part, parcel, or tract of land, called *Magruder’s Plains*, containing 81 acres, more or less, taken as the property of *Daniel Purl*, to sa-

satisfy three judgments, one at suit of *John B. Magruder*, **JUNE 1820.**
 one at suit *Notley Maddox*, and one at suit *Elisha Berry*;
 and also to satisfy sundry officers fees due. The sale to
 commence at 11 o'clock.

Purl
 vs.
 Duvall

John Darnall, Shff.

June 24th, 1812."

The defendant then offered a deed from *John Darnall*, sheriff of *Prince-George's* county, to him, the defendant, for the land mentioned in the declaration, called *Magruder's Plains Enlarged*, dated the 1st of August 1812, in which deed the name of the land, courses, distances and quantity, are the same as mentioned and described in the deed herein before mentioned from *Magruder* to *Purl*, and in the declaration in this cause. The deed so offered in evidence recited, that "Whereas by virtue of one writ of *feri facias*, issued from a single magistrate, to the said *John Darnall* directed, against *Daniel Purl*, also taken under execution to satisfy sundry officers fees due, and satisfy an elder judgment at the suit of *John B. Magruder*, the said *John Darnall*, after due notice being given of the time and place of sale, on the third day of July last past, did expose at public sale to the highest bidder for cash, all the right, title, estate and interest, of the said *Daniel Purl*, to and in part or parcel of a tract of land called *Magruder's Plains Enlarged*, beginning for the same," &c. "containing one hundred acres of land more or less, leaving out of the said tract of land twenty acres of land before sold to *Joseph Dunlop*. Whereas at the sale of said land, the said *Benjamin Duvall*, of *Elisha*, was the highest bidder, and became the purchaser of the said tract or parcel of land as before mentioned, for the sum of three hundred and one dollars current money: and whereas the said *Benjamin Duvall*, of *Elisha*, did, at the time of the purchase aforesaid, satisfy and pay to the said *John Darnall* the said sum of money. Now this indenture witnesseth," &c. The defendant then read in evidence a deed from *Daniel Purl* to *Joseph Dunlop*, dated the 17th of December 1807, for 19 acres, part of the tract of land called *Magruder's Plains Enlarged*, described by courses and distances. But did not show or offer in evidence any other judgment or process under which he claimed title to the land mentioned in the declaration. The plaintiff then prayed the court to direct the jury, that

JUNE 1820. the evidence so offered by the defendant was not sufficient to sustain the issue on his part, and that the title by him set up under the judgment and proceedings under the same, the sale of the sheriff, *John Darnall*, and the deed executed by the said *Darnall* to him, is not a good and valid title in law. Which opinion the court, [*Johnson*, Ch. J. *Key* and *Plater*, A. J.] refused to give, but on the contrary were of opinion, and so directed the jury, that the plaintiff on the preceding facts, if found to be true by the jury, was not entitled to recover. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

Purl
vs
Duvall

The cause was argued before BUCHANAN, EARLE and DORSEY, J.

Magruder, for the appellant. This ejectment was brought for *Magruder's Plains Enlarged*, being a resurvey on *Magruder's Plains*. The deed from *Magruder*, the grantee of the land, to *Purl*, the lessor of the plaintiff, is for 100 acres, part of *Magruder's Plains Enlarged*, and is dated in 1810. The land in this deed is the same for which the ejectment was brought, the descriptions in both being alike. The defendant, in the court below, to show a title out of the plaintiff, offered in evidence a judgment against the lessor of the plaintiff in 1806, a *fieri facias* thereon in 1807, under which the land, for which the ejectment was brought, was supposed to be taken in execution, and a sale thereof to the defendant, under a *venditioni exponas* in 1812, and also the sheriff's deed to the defendant in 1812. The *fieri facias* appears to have issued after sundry *ca. sa's* had issued, under which the defendant in the judgment was taken in execution. These *ca. sa's*, it seems, were entered *not called by consent*. The *fieri facias* was laid on part of a tract of land called *Magruder's Plains*, by *N. Maddox*, the then sheriff, and the writ was returned by him, that the land was unsold for want of buyers. A similar return was made by him on the first *venditioni exponas*; on the second the land was sold by *John Darnall*, the then sheriff. The notice given by *Darnall* of the sale, called the land *Magruder's Plains Enlarged*, but it does not state at what place the sale was to be made. In *Darnall's* deed to the purchaser, the defendant in the court below, the land is called *Magruder's Plains Enlarged*, and

is described by courses and distances, adopting those in JUNE 1820. the deed from *Magruder* to *Purl*, leaving out 20 acres sold to *Dunlop*, but that deed was for only 19 acres. There are a number of objections to the title set up to the defendant.

Purl
vs
Duvall

1. When the judgment was obtained, under which the land was sold, there was no deed for the land vesting a legal title in *Purl*, who had no interest therein until two years after the return of the *fiery facias*, under which the land was seised and taken.

2. The land was taken in execution by a wrong name, and when the defendant in the execution had only an equitable estate therein.

3. The *fiery facias* was laid on the land by *Maddox*, the then sheriff, and afterwards sold by *Darnall*, his successor in office. The sheriff who lays the execution on the land is the person who is to sell it, and it cannot be done by his successor. 6 *Bac. Ab.* 161.

4. If *Darnall* had the right to sell, he could only sell *Magruder's Plains*. He had no right to correct the error in the name. He was commanded to sell *Magruder's Plains*, and he could not sell any other land, or the same land by any other name.

5. There is not that certainty in the sheriff's return, of the land taken under the *fiery facias*, which the law requires. He does not state that he had taken all the defendant's interest in the land, but that he had taken 81 acres, part of a large tract, without any description of any nature or kind. 2 *Bac. Ab. tit. Execution*, (P.) 739. *Williamson vs. Perkins*, 1 *Harr. & Johnson*, 449. *Fitzhugh vs. Hellen*, (June 1811.) But it may be said that the subsequent act of the sheriff in his deed cures the defect. This is not so; for unless the return is correct, it is void, and nothing afterwards can remedy it. It is the sheriff's duty to apprise the party of the property upon which he levies a *fiery facias*. He is to give notice to all persons of the property to be sold; and unless he does so, no title passes by his sale. If it were otherwise a sheriff might take the worst part of a tract of land and sell it, and give a deed for the best part. If a sheriff can correct by his deed, still there must be as much certainty in the deed as in the return. Here the sheriff states that he sold 81 acres of land, and he conveys 100 acres, excluding twenty

JUNE 1820. acres, and refers to *Dunlop's* deed, and when that deed is examined, it is for 19 acres. If therefore all previously was regular, yet the deed is not so; if it were so, the plaintiff was entitled to a verdict for one acre of land.

Purl
vs
Duvall

Stephen, for the appellee. There are two questions in this case—1. Whether an equitable interest in land taken in execution under a *fieri facias* can be sold under a *venditioni exponas*, the legal title having been acquired in the intermediate time? 2. Whether if the land was levied upon, and advertised as *Magruder's Plains*, and sold and conveyed as *Magruder's Plains Enlarged*, the defendant in the judgment and execution can avail himself of this objection in an action of ejectment? This action is brought by the original defendant, against whom a judgment had been rendered, and the land in question taken in execution, under a *fieri facias* issued on that judgment, and sold to the present defendant. The original defendant now comes to take advantage of supposed errors in the proceedings. A purchaser at a sheriff's sale for a valid consideration, is to be favoured, and his title is to be protected, at least against the person whose property was sold. Where two writs of *fieri facias* come to the hands of the sheriff, he is to execute that which is first delivered; but if he execute the second first, the execution is good, and the party can only have remedy against the sheriff. The statute of 29 Charles II, ch. 3, s. 16, changed the common law, so as to make the *fieri facias* bind from the time of the delivery to the sheriff. The vendee who purchased under the second writ is quieted in his possession. *Bull. N. P.* 91. *Smallcomb vs. Cross & Buckingham*, 1 *Ld. Raym.* 251. *Hutchinson vs. Johnston*, 1 *T. R.* 729. These authorities show why vendees at sheriffs' sales are protected in their purchases; and a sale by a sheriff continues good, though the judgment be afterwards reversed. 4 *Com. Dig.* tit. *Execution*, (C. 6.) Here the lessor of the plaintiff laid by, and suffered the proceeding to take place without objection, and now wishes to take advantage of its supposed irregularity. Shall the irregularity, if any, of the sheriff, defeat the title of the purchaser, who is guilty of no fraud? Shall the conduct of the lessor of the plaintiff enure to his benefit? He should have warned the defendant, and his not doing so was a waiver of his right. If a man, witnessing a deed conveying his land, is bound, it is a strong reason why the

lessor of the plaintiff here should be estopped and concluded. He had only an equitable interest when the *fieri facias* was laid, yet he had acquired the legal estate before the sale under the *venditioni exponas*. If the return to the *fieri facias* was irregular, the lessor of the plaintiff should have moved to quash it. By his neglect to do so, the sheriff has paid the money over, and the lessor of the plaintiff has no remedy against him. But it has been said that the *fieri facias* was laid upon land by a wrong name; that the ejectment is brought for part of *Magruder's Plains Enlarged*, and the evidence produced by the defendant was for *Magruder's Plains*. If the *fieri facias* was levied upon *Magruder's Plains*, upon which *Magruder's Plains Enlarged* was a resurvey, then it is the land for which the plaintiff has brought his ejectment, and having been taken and sold as the original tract, it conveyed and passed the resurvey. But it is said that a different sheriff made the sale from the sheriff who took the land in execution. This was a clerical error in directing the *venditioni exponas* to the then sheriff, instead of the old sheriff who had seized the land, and it should not vitiate the proceeding. A *venditioni exponas* is the mandate of the court, and remains valid until it is quashed. The defendant in the execution has no remedy now. He might have moved to quash the writ at the return day. When a court misconceive, as where letters of administration are granted, and the person on whose estate they are granted is not dead, all payments made to the administrator are valid. It has also been said, that there is not sufficient certainty in the sheriff's return to the *fieri facias* of the land seized under it. The title papers show that there were 100 acres, part of *Magruder's Plains Enlarged*, purchased by the lessor of the plaintiff from *Magruder*, and this was the whole of what he claimed, or had a right to in that tract, except the part he had sold to *Dunlop*, containing 19 acres; and the sheriff's return says he levied the *fieri facias* on part of the tract, calling it *Magruder's Plains*, containing 81 acres; it is therefore sufficiently certain, because from the records the true description of the part, in which *Purl* had a right, could be easily ascertained. But it is said there is a mistake of one acre in the sheriff's deed to the defendant as to the part excepted, as having been sold to *Dunlop*. The sheriff's deed conveys all the

Purl
vs.
Duvall

JUNE 1820.

JUNE 1820

Purl
vs.
Duvall

right of Purl in the land, except that part conveyed to *Dunlop*. The intention was to pass all *Purl's* interest, and the exception of 20 acres sold to *Dunlop* is of no consequence. That exception was meant to exclude the number of acres sold to *Dunlop*, and whether that number was 19 or 20 acres is wholly immaterial.

Magruder, in reply. It is not necessary to answer the preliminary observations of the appellee's counsel. The defendant produced no evidence at the trial that the lessor of the plaintiff ever had any notice of the *fieri facias*, *venditioni exponas*, sale, &c. The advertisement was no notice as to where the land was to be sold. There was no evidence that the advertisement was ever set up, nor where the sale took place, or who was present. It is not to be presumed that the lessor of the plaintiff ever had any notice of any of the proceedings. A person whose property is sold under an execution, is not obliged to appear and move the court to quash the writ or return. If there is any doubt, when he does appear, the court will not quash the writ or return, but leave the party to his remedy at law. A purchaser at a sheriff's sale is bound to show that he purchased under a legal sale. An irregular execution is not voidable, but it is absolutely void. 2 *Bac. Ab. tit. Execution*, (P.) 739. The cases of waiver, &c. are different from a proceeding like the present, if notice was proved. But here it is not proved that the party had notice, or was in a situation to obtain it. But it is said, that if *Magruder's Plains* was purchased, then of course the defendant purchased the resurvey. This is not so. If he purchased the resurvey, then he purchased the original; but as the resurvey included more land than the original tract contained, then *non constat*, a part of the resurvey might be sold which the original did not include. But the sheriff, in his return to the *fieri facias*, should have stated with certainty the land seized, so as to enable the party, whose property is thus taken, to ascertain what land it is that is sold, and to enable the purchaser to ascertain the land purchased. It is not sufficient for the sheriff to certify that he had taken half or a third, &c. of a tract of land. This is not such a description as the law requires. It must also appear that the sheriff sold the same property which he had taken under the *fieri facias*. Here the old sheriff gives no description of the land—nor does the new

sheriff give any, until after the sale is made, when he undertakes to convey that which he had not stated he intended to sell, and that too by a different name from that named in the writ under which he did sell. But it is said, that there being a clerical error, no advantage can be taken of it. Suppose the clerk had issued a *fieri facias* against the property of a man where no judgment had been rendered, and his land was taken and sold, it would be strange to say, that if he did not move the court to quash the execution, he could not afterwards take advantage of the error.

JUNE 1820.
Jurl
vs
Duvall

DORSEY, J. delivered the opinion of the court.

In the argument of this cause, it was urged by the appellant's counsel, that the sale made by *Darnall*, the then sheriff of *Prince-George's* county, under the *venditioni exponas* issued on the 23d of June 1812, and the deed executed by him to the defendant, who was the purchaser, did not divest the title of the lessor of the plaintiff to the lands in question. And in support of this position the following points were made:

1. That the return of the sheriff on the *fieri facias*, stating that he had laid it on part of a tract of land called *Magruder's Plains*, containing 81 acres, was defective, as being too general, and not giving a description of the property sufficiently certain.

2. Because the lessor of the plaintiff, at the time the *fieri facias* was laid, had only an equitable interest in the land: And

3. Because *Darnall* had no power to sell the premises under the writ of *venditioni exponas*.

The court do not deem it necessary to give any opinion on the *first* and *second* points, because they are of opinion that *Darnall* had no authority to execute the writ of *venditioni exponas*. The authorities clearly establish the position, that if a sheriff, upon a *fieri facias*, seize goods, and return that they remain on hand *pro defectu emptorum*, and he be removed, yet he, and not the new sheriff, is to proceed in the execution; for an execution being an entire thing, he who begins it, must end it. *Dalton's Sheriff*, 19. *Clerk vs. Withers*, 1 Salk. 323. 6 Bac. Ab. tit. Sheriff, (I) 161.

The appellee's counsel does not controvert the correctness of this principle, but has argued, that the *venditioni*

JUNE 1820. *exponas* was the mandate of the court, in the nature of an interlocutory order, and therefore, if erroneous, voidable, and not void; and that being voidable, the lessor of the plaintiff, on the return of the process, ought to have moved the court to set it aside; and having failed to do this, he is precluded from taking any advantage of its irregularity in a collateral way. In answer to this objection, it is sufficient to say, that no express order appears on the record, that the clerk should issue such a writ as has been issued; and if writs of execution are supposed to be issued, under an implied authority from the court, such authority can only be implied in those cases where the execution is warranted by the principles of law. As the writ, therefore, was directed to *Darnall*, instead of *Muddox*, it was void, and every thing done under it must be considered as a nullity.

Burnet, &c
vs
Courts

It has been pressed upon the consideration of the court, that the security of purchasers at sheriffs' sales, would be greatly impaired if their validity could be inquired into at any distance of time. This objection might apply with great force in some cases, but it cannot serve the defendant in this cause; because the defect, which vitiates his purchase, is apparent on the record under which he makes title. It may be his misfortune, that he has mistaken the law, by supposing that *Darnall* had authority to sell; but he is estopped from setting up his ignorance of the law as the foundation of his title.

The court therefore are of opinion that the judgment of the county court is erroneous.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

COURT OF APPEALS, JUNE TERM, 1820.

BURNET & RIGDEN, use of GILMOR, *et al. vs.* COURTS.

Where the original defendant in a supersedeas judgment pays the debt, whether with his own money or with that of others, the securities in the supersedeas are discharged, notwithstanding such original defendant may enter the judgment for the use of the persons from whom he borrows the money with which he pays the judgment or debt.

APPEAL from *Charles* county court. The case was this: A judgment was rendered in *Charles* county court in favour of the present appellants, against *John Campbell*, in August 1807. It was superseded by a confession entered into on the 29th of March 1809, by *Campbell*, with *F. Newman* and *W. Courts* as his sureties. On this confes-

On this confession the court awarded judgment for the use of the persons from whom he borrows the money with which he pays the judgment or debt.

sion a *scire facias* issued on the 17th of February 1817, JUNE 1820.
 against *Campbell, Newman and Courts*. They appeared,
 and *Newman and Courts* pleaded *nul tiel record* of reco-
 very and confession, and *payment* by *Campbell*. To which
 there were the general replications and issues joined.
Campbell made no defence, and by his confession a *fiat* was
 entered. *Newman's* death was suggested at March 1818.
 The court gave judgment against *Courts* on the plea of
nul tiel record.

Burnet, &c
 vs
 Courts

At the trial of the other issue, *Courts*, the defendant,
 proved that *Campbell* informed the attorney of the legal
 plaintiffs in this cause, on the 31st of March 1810, that he
 had obtained a loan by the aid of some friends, the persons
 for whose use this action is entered, from a bank, on notes
 endorsed by said persons, and discounted at the said bank,
 to extricate him from his embarrassments. That *Campbell*
 paid to the said attorney the amount of the principal, in-
 terest and costs, as well of the original as of the superse-
 deas judgment. That *Campbell* informed the said attor-
 ney that he had promised the persons from whom he ob-
 tained the money, an assignment of the judgments against
 him—the witness did not recollect that he mentioned any
 thing on the subject of the judgment against his sureties.
 That the attorney on the 31st of March 1810, on receipt
 of the money, assigned the judgment to *Gilmor, Howard*,
 and others, and delivered the assignment to *Campbell*, whom
 he considered as acting generally in this transaction as the
 agent of said persons. The plaintiffs then read in evidence
 the docket entries of the execution issued on the *superse-*
deas judgment, in the names of the original plaintiffs, for
 the use of *Gilmor, Howard*, and others, against *Campbell*,
Newman and Courts; and also proved by the said attorney,
 that he would not have caused the entries for the use of the
 persons for whose use this suit is brought, to have been
 made, except by the direction of *Campbell*. The defen-
 dant also proved, that the legal plaintiffs knew nothing of
 the assignment, or ever gave any direction that it should
 be made. He further proved, that a similar arrangement
 was made by *Campbell* with Major *Chapman*, (another at-
 torney of the court,) in other cases of executions similarly
 situated; and further, that 3 or 4 years ago, Col. *Howard*
 and Major *Chapman* had a conversation on the subject, in
 which *Howard* inquired what chance there was of their get-

JUNE 1820. <sup>Burnet, &c
vs
Courts</sup> ting their money from *Campbell*, and directed his inquiries particularly as to *Campbell's* solvency and property; in the course of this conversation, *Chapman* told him that he believed there were judgments assigned for their use, in which there were sureties; to which *Howard* replied, that he knew very little about the transaction, but believed there were some such assignments. The defendant also read in evidence, a deed of trust from *Campbell* to *W. Cooke* and *J. B. Morris*, dated the 4th of November 1816, reciting, that *Campbell* being indebted on mortgages, &c. and on judgments, to the persons for whose use this suit, and several others were entered, as per schedule, did convey, &c. to the said *Cooke* and *Morris*, and authorise them to sell all his lands, negroes, &c. for the purpose of paying his said debts. He also gave in evidence the following docket entries, viz.

"Burnet & Rigdon, use of Robert Gilnor, et al.	}	Ca. sa. on <i>Supersedeas</i> issued to March term 1810.
vs.		
John Campbell, Francis Newman, and William Courts.	}	Cepi, Francis & William, non est John.
		Not called by consent.
Same use Same.	}	Sci. fu. Docketted by consent August
vs.		term 1811.
John Campbell.	}	Fiat by confession," &c.

The defendant then prayed the court to instruct the jury, that if they believed the evidence, the plaintiffs were not entitled to recover. Which instruction, [*Johnson*, Ch. J. and *Plater*, A. J.] gave as prayed. The plaintiffs excepted. Verdict and judgment being for the defendant, the plaintiffs appealed to this court.

The cause was argued before BUCHANAN, EARLE, and DORSEY, J. by

Stone, for the appellants, and by

Harper, for the appellee.

DORSEY, J. delivered the opinion of the court.

Burnet and *Rigden* recovered a judgment in *Charles* county court against *John Campbell*, who afterwards superseded the same, with *William Courts* and *Francis Newman* as his sureties. A *ca. sa.* issued on the *supersedeas* judgment, returnable to March term 1810, on which *Wil-*

JUNE 1820.

Burnet, &c.,
vs.
Courts

liam Courts alone, was taken, and the execution was entered, not called by consent. A *scire facias* was afterwards issued in the names of *Burnet* and *Rigden*, for the use of *Gilmor*, *Howard*, *Swan* and *Pringle*, against *Courts*, to revive the *supersedeas* judgment, who being summoned, appeared in court, and pleaded payment of the judgment by *John Campbell*, on which issue was joined; and on the trial, the court below gave an opinion, that on the testimony stated in the bill of exceptions, the plaintiffs were not entitled to recover. The testimony is express, that *John Campbell* paid to the attorney of the legal plaintiffs, the full amount of the debt, interest and costs, due on the original and *supersedeas* judgments. But it is contended, that *Campbell*, in making the payment, acted as the agent of *Gilmor*, and others, who were the real purchasers of the judgments, and therefore took an assignment of the judgment in their names. The facts proved, so far from warranting the inference that *Campbell* acted as the agent of *Gilmor* and others, decisively show, that the money with which the judgments were satisfied, belonged to *Campbell*, and was raised by him at bank, by discounts on paper loaned by *Gilmor*, and others, to him, for the purpose of extricating him from his embarrassments; and although *Campbell* might have been willing and desirous that the judgments should be assigned or pledged to his endorsors, as a security for their engagements at bank for his benefit, yet he had no power or authority, by getting an assignment from the attorney of the legal plaintiffs, to pledge the responsibility of the superseders, who had become his sureties, and whom in law and justice he was bound to save harmless.

It has been urged by the appellant's counsel, that the court below ought to have left it to the jury to say, whether *Courts* did not assent to the assignment.

There was no evidence from which the fact of assent could be inferred; and if such fact had been found, it could not have estopped the defendant from setting up a payment, which both in law and conscience operated to discharge him from all responsibility.

JUDGMENT AFFIRMED.

JUNE 1820.

COURT OF APPEALS, JUNE TERM, 1820.

Kilgour
vs
Ashcom

KILGOUR vs. ASHCOM.

A, died intestate, seized of a tract of land on which there was a gristmill then in operation. On a division of the land under the act to direct descents, amongst his heirs, the mill was on the part allotted to B, the dam of which covered a portion of the part allotted to C—Held, that B had a right to use the mill & dam in the same way, and to the same extent, as they had been used by A in his life-time

APPEAL from *Saint-Mary's* county court. The appellee brought an action on the case against the appellant for obstructing a water course, &c. The injury complained of, and set forth in the declaration, was overflowing lands by the back water from a mill in the occupancy of the plaintiff below. The defendant pleaded not guilty, and issue was joined. A warrant of resurvey was issued, and the lands were laid down on plots returned. At the trial, it was given in evidence, that *John Keech* died intestate, and at March term 1805, a petition, under the act to direct descents, was exhibited in *Saint-Mary's* county court by his heirs, for a division, &c. of his real estate, and a commission of partition issued. The return of the commissioners was finally ratified by the court at August term 1808. By this return it appears that the real estate of *J. Keech* was divided into five parts, of which *Mary Keech* was entitled to one part, and *Samuel Keech* to another part. The plaintiff is the grantee of *Mary Keech*, and the defendant the lessee of *Samuel Keech*. It was proved, that in the allotment made by the commissioners, a grist-mill, then in operation, became the property of *Samuel Keech*, the defendant's lessor, and the part adjacent became the property of *Mary Keech*, the plaintiff's grantor. A small portion of the mill-dam was included in the part allotted to *Mary Keech*, and this is the *locus in quo*, where the injury complained of is stated to have been committed. It was also proved, that the mill remained in the same situation in which the common ancestor, *J. Keech*, left it, to the time of the partition, and from that time to the time of bringing this action. The defendant then prayed the court to instruct the jury, that if they believed from the evidence that the land laid down by the plaintiff as his pretensions and claim, and the land on which the mill stood, and the dam thereof and appertenances, now held by the defendant, belonged to *J. Keech*, and descended to the grantor of the plaintiff, and *Samuel Keech* the landlord of the defendant, and was respectively allotted to them by the commissioners in the same plight and condition which the same was in at the impetration of the original writ in this cause, that the plaintiff was not entitled to recover. But the court,

[*Key and Plater, A. J. (a)*] refused to give the opinion, but JUNE 1820. instructed the jury, that if they believed the facts stated, the plaintiff was entitled to recover. The defendant excepted. Verdict and judgment being for the plaintiff, the defendant appealed to this court.

Kilgour
vs
Ashoon

The case was argued before BUCHANAN, EARLE, and DORSEY, J. by

Stone, for the appellant, and by

Stephen, for the appellee.

BUCHANAN, J. delivered the opinion of the court.

The evidence is substantially this, that *John Keech* died intestate, seised of certain lands in *Saint-Mary's* county, which, in the execution of a commission issued at the instance of his children, under the act to direct descents, was divided into five parts, one of which was allotted to *Mary Keech*, one of the children, under whom the appellee holds, and another to *Samuel Keech*, under whom the appellant holds. That there is a mill on the part allotted to *Samuel Keech*, which was upon the premises, and in operation during the life of *John Keech*, their common ancestor, the dam of which covers a small portion of the part allotted to *Mary Keech*, which is the injury complained of in the declaration, and that the mill and dam were, at the time of bringing the suit, in the same situation in which they were left by *John Keech*, and had been held and used by him in his life-time. And the question is, whether *Samuel Keech*, and those claiming under him, have a right to use them in the same way, and to the same extent; and it is clear that they have. The children of *John Keech* took their respective proportions of their father's estate in the same condition, and subject to the same advantages and disadvantages under which he held it. The dam is appertinent to the mill, and if *John Keech* had sold the mill, with all the appertenances, it cannot be contended, that he could have sustained an action against the purchaser for the injury complained of here; and if he could not, it is difficult to perceive on what principles the appellee can maintain this suit against the appellant, who cannot be supposed to stand in a worse situation than the purchaser would have done. Besides, it was the duty of

(a) *Johnson*, Ch. J. dissented.

JUNE. 1820. the commissioners, and it must be supposed that they did, in dividing the estate of *John Keech*, to take into consideration all the advantages and disadvantages attending the respective parts, and that they gave to the part allotted to *Mary Keech*, an equivalent for the injury and inconvenience occasioned by the mill dam; and she took it accordingly.

Owings
vs
Turnpike C'y.

JUDGMENT REVERSED.

COURT OF APPEALS, JUNE TERM, 1820.

OWINGS vs. THE BALTIMORE AND REISTER'S-TOWN TURNPIKE ROAD.

The 53d sec. of the act of 1804, ch. 51, incorporating several turnpike road companies, applies only to those persons who reside on premises which lie on and touch the road, and are within three miles of a turnpike-gate.

APPEAL from *Baltimore* county court. It was an action of *assumpsit* for money paid, laid out and expended, and for money had and received, brought by the appellant against the appellees. The following case was submitted to the county court for their opinion, viz. That the plaintiff, (now appellant,) resides on a tract of land situated within three miles of the turnpike gate, No. 2, of the *Baltimore and Reister's-town Turnpike Road*, but that no part of the said tract runs with, binds on, or touches the said road. That at many periods between the 10th of February 1814, and the 10th of February 1816, the plaintiff passed the said turnpike gate oftener than once in 24 hours, always paying, the first time of so passing, the accustomed toll. That on coming the second time to the said gate, during the same 24 hours, which often occurred, the plaintiff invariably protested against the demand made of toll from him by the gate keeper, he, the plaintiff, alleging that he was exempted from a second payment of toll on the same day, by virtue of the *thirty-third* section of the act of 1804, ch. 51, entitled, "An act to incorporate companies to make several turnpike roads through *Baltimore* county, and for other purposes," (a) inasmuch as he resided within three miles of said gate, and adjacent to the said road; notwithstanding which, the defendants persisted in their demands, and would not at any time permit the plain-

(a) By this section, no toll is to be demanded from any person "living on or adjacent to the said road, within three miles of any of the said gates or turnpikes," for passing the said gate more than once in twenty-four hours.

tiff to pass oftener than once during the space of 24 hours, JUNE 1890
 until he had paid toll for every time of so passing; by
 means of which the plaintiff has paid to the defendants in
 amount \$200 for so passing, in a variety of instances, a
 second time, and oftener during the same 24 hours between
 the periods herein first stated, viz. the 10th of February
 1814, and 10th of February 1816; for the recovery back
 of which money, so paid as aforesaid, the present action
 is instituted. On this statement the only question for de-
 cision was, whether a person residing at a spot any where
 within three miles of a turnpike gate, no matter how near
 thereto, whose land does not in any part thereof actually
 touch the road, can pass the gate as often as he pleases dur-
 ing the space of 24 hours, by paying toll once only dur-
 ing that period of time, by virtue of the *thirty-third*
 section of the said act. The county court gave judgment
 for the defendants, and the plaintiff appealed to this
 court.

Owings
 vs
 Turnpike C'y.

The case was argued at this term, before BUCHANAN,
 EARLE, JOHNSON and DORSEY, J. by

Hoffman, for the appellant, (a) and

Winder and Harper, for the appellees.

BUCHANAN, J. delivered the opinion of the court.

In this case, which depends entirely on the *thirty-third*
 section of the act of 1804, *ch. 51*, incorporating several
 turnpike road companies, the court see no reason for doubt.

The privilege accorded by that section to persons resid-
 ing on or adjacent to the turnpike road, within three miles
 of any turnpike gate, by paying once in twenty-four hours,
 must be confined to persons who reside on premises which
 lie on and touch the road within three miles of the gate,
 and cannot be extended, as contended for by the appellant,
 to those who reside any where within a circle of three
 miles round the gate, whether they reside on premises
 which touch the road or not.

JUDGMENT AFFIRMED.

(a) He cited *Rces vs. Abbott*, Cowp. 832. *Wright vs. Kemp*, 3
T. R. 473. *Barker vs. Suretees*, 2 *Stra.* 1175; and *Farmingham*
vs. Brand, 3 *Atk.* 390.

JUNE 1820.

COURT OF APPEALS, JUNE TERM, 1820.

Baptiste
vsBAPTISTE, *et al.* vs. DE VOLUNBRUN.

De Volunbrun

The act of 1796, ch. 67, prohibiting the importation of slaves is applicable only to voluntary importations, and where the importer intends to sell the slaves, or to reside himself in the state.

An owner of slaves driven from *St. Domingo* by the insurrections in that island, and coming with his slaves to this state, is not within the prohibition of the act of 1796, provided she does not intend to reside permanently in the state, or to sell the slaves.

The declarations of such owner, of his intention to return to the island when the troubles there had ceased, are evidence of such intention, and if she does not become a naturalized citizen, are conclusive evidence, and this although she continues actually to reside here for any number of years.

If such owner goes first with her slaves, on her flight from *St. Domingo*, to some other of the *United States*, and resides there for several years, and then comes with them to this state, because the climate of such other state was injurious to her health, she is not within the prohibition of the act of 1796.

The laws of foreign states are facts, and must be proved as other facts.—Historical evidence of them is insufficient.

APPEAL from *Baltimore* city court. This was a petition for freedom, and was submitted to *Baltimore* city court, upon the following statement of facts, viz. That the defendant, (the appellee,) being driven from the island of *Saint Domingo* by an insurrection of the negroes, fled to the city of *New-York*, carrying with her the petitioners, (the appellants.) She arrived at *New-York* in 1797, but finding the climate unfavourable to her health, removed to the city of *Baltimore*, with the petitioners as part of her family, in 1802. That she has constantly and uniformly declared her intention to return to her own country, when circumstances should permit, and for this reason never became a citizen of the *United States*, or of this state. That the petitioners having attempted to escape to *Saint Domingo*, she caused them to be sent to *New-Orleans*, as her property, subject to her future orders. *Baltimore* city court gave judgment upon this statement against the petitioners, and they appealed to this court.

The case was argued at this term, before BUCHANAN, EARLE, JOHNSON and DORSEY, J. by

Raymond, for the appellants. The facts upon which the petitioners ground their claim to freedom are, that they, and the defendant, were, in 1797, citizens of the Island of *St. Domingo*, a colony of *France*, and subjects of the *French* empire. That in 1797, they emigrated to *New-York*, and there remained five years. That in 1802, the defendant removed to *Baltimore*, and brought the petitioners with her, where they continued to live till after the filing this petition, and that the defendant is an alien. Since this petition was filed, and the summons served on the defendant, she has sent the petitioners to *New-Orleans*. This was a high-handed contempt of the justice of the state, and cannot therefore benefit the defendant. The foregoing facts are relied on as bringing this case within the first section of the act of 1796, ch. 67, which enacts, "that it shall not be lawful to import or bring into this state, by land or water, any negro, &c. for sale or hire, or to reside within this state; and any person brought into this state as a slave, contrary to this act, if a slave before, shall thereupon immediately cease to be the property of the person or persons so

importing or bringing such slave within this state, and shall **JUNE 1820.**
 be free." The *second section* containing an exception in fa-
 vour of *citizens* of other of the *United States*, coming to this
 state to reside, and bringing their slaves with them; but as the
 defendant is an alien, and not a citizen of any of the *Uni-
 ted States*, she can claim no benefit from this section. The
fourth section contains an exception in favour of *travellers
 and sojourners*: It is this, "that nothing in this act con-
 tained shall be construed or taken to affect the right of any
 person or persons travelling or sojourning with any slave
 or slaves within this state, such slave or slaves not
 being sold, or otherwise disposed of in this state, but car-
 ried by the owner out of this state, or attempted to be car-
 ried." Upon this section the defendant founds her right
 to retain the petitioners in bondage. The question for this
 court to decide, therefore, is, whether the defendant was a
traveller or a *sojourner* within this state, from 1802 till
 1818, the time when this petition was filed, or whether she
 was not a *resident* in this state during that period; if a *so-
 journeyer*, then the petitioners are not free. What then is
 the difference between a *resident* and a *sojourner*? A dif-
 ference there must be, else the two sections of the statute
 are co-extensive, and the one repeals the other. Did the
 defendant in 1802, come to this state to *reside*, and has
 she *resided* here ever since, or did she come here to *so-
 journ*, and has she *sojourned* here ever since? The pre-
 cise meaning of these words, and the difference between
 them, cannot be ascertained by reference to lexicographers,
 who usually give nearly the same meaning to both words.
 But in law, and when used in statutes, they have a techni-
 cal meaning, and are contra-distinguished one from the
 other. Thus, when *sojournment* ends, *residence* com-
 mences, and *vice versa*; so that the two words cover the
 whole time. A man's home, where his family is establish-
 ed, or where he himself is established in business, or takes
 up his abode for a permanent or indefinite period, is his re-
 sidence. If a man from a neighbouring state rents a farm
 in this state for one year, and removes his family to it, he
 becomes a *resident* the moment he does so, although he may
 intend to return at the end of the year. So if a man from
 an adjoining county rent a house in *Baltimore* for six
 months only, and remove his family there, he becomes a
 resident. So the defendant, by living sixteen years in

Baptiste
 vs
 De Volunbran

JUNE 1820. *Baltimore* with her family, has not only become a resident long since, but has shown that she came there to reside, the moment she came to the state, although she may have some distant and uncertain hope of leaving the state at some future period. The word *sojournment* is derived from the *French* substantive *sejour*, or the *French* verb *sejourner*, which means a temporary residence or dwelling for a short time. *Sejour* or *sejourner* is a compound word. To the word *jour*, which literally signifies a day, is prefixed the personal pronoun *se*, which gives it a personal signification, and restricts its application to persons. Neither the word *sejour*, nor any of its derivations, can with any propriety be applied to brute animals, or to any thing but the human species. It cannot with propriety be said of a horse that he *sojourns* in a place. Hence the literal meaning of the word *sejour*, or *sejourment*, is a dwelling in a place for a day only; and by an extended, and somewhat figurative mode of expression, it is used to signify a dwelling in a place *for a short time*, without ascertaining the precise length of time. This time of *sojournment* may be longer or shorter, in relation to the object to which it is applied. Thus it is said, that the children of *Israel* sojourned four hundred and thirty years in the land of *Egypt*. This is a figurative mode of expression, but may nevertheless be allowed, in regard to a nation, whose term of existence is indefinite, and may last many thousand years. In relation to a nation then, 430 years may be said to be *a short time*; but to speak of sojournment, in relation to an individual, for that period, would be absurd; and it would be very little less than absurdity to suppose the legislature, in their use of the term *sojournment* in this statute, contemplated a residence of sixteen years. If this latitude is given to the term, no reason can be given for limiting it to a period short of the duration of life. That the legislature did not use this term in any such unlimited sense, is manifest from the very nature and object of the statute. The object of the law was to restrain the further increase of slaves in this state by importations; but if such a latitude is given to the word *sojournment*, what is there to prevent the *West India* planters from removing to this state with their slaves, and remaining as long as they please? But the legislature has given a construction to this statute, from which this court is not at liberty to

Baptiste

De Volunbrun

depart. By an act passed in April 1783, *ch. 23*, the introduction of slaves into this state was prohibited. This act is in the same terms as the act of 1796, *ch. 67, s. 1* and 4, except that the words "*for a short time*" are annexed to the word *sojourners*. So that the act reads, *travelling or sojourning for a short time, &c.* But it has already been shown, that sojourning, of itself, necessarily imports dwelling in a place *for a short time*. Sojourning, and *sojourning for a short time*, are precisely equivalent expressions. The words *for a short time*, are mere tautology; they neither make the meaning more definite, nor limited. The difference, therefore, between the phraseology of these acts, merely shows, that the legislature in 1796, understood the import of the language used, better than the legislature of 1783. The same construction, therefore, which the legislature has put upon the act of 1783, must be put upon the act of 1796. By the act of 1792, *ch. 56*, it was enacted, that slaves imported, or to be imported, by *French* subjects, who have removed, or might remove, from any of the *French* islands into this state, since the derangements in the *French* government, should remain the property of their masters; but not so as to affect any right such slaves might have acquired to freedom. It was also provided, by this last act, that the subjects of *France*, who had sought, or might seek, an asylum in this state, if they became citizens or settlers therein, should be entitled to keep a certain number of their domestic or house slaves, viz. a master of a family five, and a single man three, and hold them; but if they did not become citizens, or settlers, they might hold their slaves for their own use, but not for sale, during their residence here. It was further directed, that *French* emigrants, who should import any such slaves, should, within three months thereafter, deliver and lodge with the clerk of the county a list of such slaves, and notify which he intended to retain as his domestic or house slaves, which list should be recorded, &c.

This was saying, in language which can not be misunderstood, that in the opinion of the legislature, under the act of 1783, the exiles from *St. Domingo* could not bring their slaves into this state, and retain them. For, if under that act those exiles could bring any number of slaves into this state, as it is contended may be done, what necessity

Baptiste
vs
De Volunbrun.

JUNE 1820. was there to pass the act of 1792? It is also to be observed, that the act of 1792 is an *enabling*, and not a *restraining* statute. The terms of the act are, that those exiles *may bring so many slaves, &c.* and not that they *may not bring more than five, &c.* It follows, that in the opinion of the legislature, without the act of 1792, those persons could not bring any slaves into this state, and retain them in slavery. Hence it follows, that the legislature has given a construction to the act of 1796; for where the terms of two acts are the same, a construction given to one, by the legislature, is a construction to both. The defendant can claim no benefit under the act of 1792, because it was repealed by 1797, *ch. 75*, before the petitioners were brought into the state; and besides, if it had not been repealed, the provisions of the act have not been complied with. The legislature, therefore, having said, that under the act of seventeen hundred and eighty-three, persons in the predicament of the petitioners could not be retained in slavery, this court is bound to say the same under the act of 1796. The defendant's counsel will rely upon the case of *De Fontaine, et al. vs. De Fontaine*, decided in this court in 1818, as a conclusive authority against the present petitioners (*a*). In the first place it may be observed, that the court did not state the ground of their decision in that case, and it is wholly impossible to imagine upon what ground it was decided. It may, however, be presumed, that the court adopted the position taken by the Attorney General, the defendants' counsel in this case—which was, that the importation there was not a *voluntary* one, but an importation from *necessity*, which does not work a forfeiture. It is difficult, it is true, to discover any *necessity* for the importation in that case, unless the mere convenience of the master be a *necessity*; but whether there was any *necessity* in that case, or not, there certainly was none in this. These petitioners were first brought to *New York*, and there remained five years, and there surely was no necessity for there being brought to *Baltimore*, unless the defendant, not being allowed to hold them as slaves in *New York*, or the possible contingency, that the climate of *Baltimore* might be more congenial to her health, shall be considered a *necessity*. However vaguely the word *necessity* may be used in common parlance, yet in law it has a precise, tech-

(*a*) See that case reported at the end of this case.

Baptiste
vs.
De Volunbrun

nical meaning. *Inevitable necessity*, and the *act of God*, JUNE 1820.
 are always used in law as equivalent expressions, and if
 any other meaning be given to the word *necessity*, than
the act of God, there is an end to all precision and certainty
 in the use of the term; it will have a different meaning
 in every new case. The prospect of enjoying better health
 —the greater security of property—nay, the more profitable
 use of that property, may be converted into a *necessity*;
 and any number of slaves may be imported upon this
 plea. Such a latitude has never been given in law to the
 word *necessity*. If a vessel were driven by tempest upon
 our coast, with slaves on board, it would be an importation
 from *necessity*; but where the party has a choice whether
 he will import or not, although it be a choice of evils, the
 importation can never be said to be *involuntary*, either in
 the legal or popular acceptance of the term. The import-
 ation, therefore, in this case, was not *involuntary*, or
 from *necessity*, even into *New York*; and *a fortiori*, was it
 not so into this state. But this case differs from that of
De Fontaine, et al. vs. De Fontaine, in another important
 particular. In that case the defendant made several
 attempts to take the petitioners out of the state, but
 was unable to do so. In this, no such attempt has been
 made. This case is, therefore, clearly distinguishable from
 that, and is not necessarily affected by it, and even if it
 was, that case ought not to be supported in direct opposi-
 tion to the will of the legislature. When a legislature has
 given a construction to a statute, that construction is em-
 phatically the will of the legislature.

But these petitioners are free upon higher ground. In
 1797 they were citizens of *St. Domingo*, a colony of
France, and of course subjects of the *French* empire. It
 is a public notorious historical fact, that at that time there
 were no slaves in *St. Domingo*, and of course these peti-
 tioners were then free. If then free, they are free now.
 In 1794 the *French* Convention passed a decree emancipa-
 ting all the slaves in the *French* colonies. 1 *Bain's Hist.*
 133. This was the legitimate act of the then legislative
 power of *France*, and it took effect immediately. All
 other legislative acts of that body have been recognised as
 valid. The sale of the royal domains, the sequestration
 of the ecclesiastical estates, the forfeiture of the estates of
 the royalists who fled from *France*, are recognised by the

Baptiste
 vs
 De Volunbran

JUNE 1820.

Baptiste
 v.
 De Volunbrun.

present Dynasty of *France*, as valid acts. This act of emancipation was equally valid and effectual. It is true, that in this state the *African* race are presumed to be slaves, and the *onus probandi* of freedom lies upon the petitioner; but this presumption arises out of a statutory provision, and cannot extend beyond the limits of the state. When it is proved, or admitted, that a person has been brought into this state from a foreign country, there can be no presumption of slavery arising from the colour of his skin. Such would be a most violent and unnatural presumption, more especially when it is known that the person has been brought from a country where slavery does not exist. In a country where the slave trade is tolerated, it might be expected that such a presumption would be made. The presumption would be perfectly in character with the trade, and those engaged in it; but in a country where this abominable traffic is condemned and prohibited under the severest penalties, where man's natural right to freedom is recognised, and proclaimed in the most solemn manner, for a court of justice to presume, merely from the complexion, without any other proof whatever, that a man is a slave, would be so repugnant to natural law, common sense, and common justice, as requires only to be stated, to be repudiated. The bare statement of such a doctrine shocks natural reason. Such a presumption, nine times in ten, would be contrary to the fact, for a small portion of the human race, with black skins, are slaves; and to presume that all persons without this state, as well as all within it, are slaves, because their skins are black or yellow, would be to give our statute an operation as extensive as the globe itself. But when it is admitted, that the petitioners were brought from a country where there were no slaves, to presume, in opposition to this, that they were slaves, would be carrying the doctrine of presumptions to an unheard of extent, and this too, in the opposite direction to which presumptions are usually carried; for it is a maxim of law that presumptions are to be taken *in favorem libertatis*; and in regard to all persons, extra-territorial, whether white or black, our statute does not interfere with this maxim. Whenever, therefore, it appears from the evidence in a cause, that a person has been brought into this state from any foreign state or country, the presumption of freedom immediately arises, and

the *onus probandi* of slavery is thrown upon the party claiming. As, then, it does not appear that the petitioners in this case ever were the slaves of the defendant, or of any other person, but on the contrary, that there were no slaves in *St. Domingo* in 1797, the time when they left that island, it must be presumed that they were then free, and if then free, they are still so. The legislature of this state appears to have acted upon the idea that the slaves of *St. Domingo* were all emancipated by the decree of the *French* Convention, and to have considered that they had no right to afford protection to persons fleeing from that island to this state, with those blacks who were formerly their slaves. The act of 1792, *ch.* 56, was passed for the express purpose of protecting the exiles from that island. In 1794, the decree of the *French* Convention was passed. In 1797, our legislature repealed the act of 1792. No reason can be assigned for this repeal, except that the legislature were of opinion, that they had no right to protect the exiles in the possession of their slaves, after the decree for their emancipation had passed. There was the same, nay a stronger reason, for keeping the act in force in 1797, than there was for passing it in 1792, provided the condition of the slaves, and the rights of masters, had continued the same. The troubles commenced in *St. Domingo* in 1791, in consequence of an act of the *French* Convention, placing the free mulattoes and mustees upon an equal footing with the whites. The civil war then commenced which gave rise to our act of 1792. In 1794 the emancipating decree passed. This increased the troubles, and caused the war to rage with greater violence; and so it continued till 1802, when the *French* government, with *Buonaparte* at its head, as first consul, revoked the decree of 1794, and decreed that all the blacks that had been emancipated by that decree, should be again reduced to slavery; and to enforce this decree, Gen. *Le Clerc* was sent to *St. Domingo* with an army. Then it was that the troubles were at their height, and the demon of carnage and desolation stalked through the island in all his majestic horrors. Then it was that the greatest portion of whites fled from their houses, to *Baltimore*, for an asylum. And can any other reason be given, why the enabling act of 1792 should not have been kept in force till this time, except that the legislature believed all the blacks to be free, and therefore they

JUNE 1820.
Baptiste
vs.
De Volundrum.

JUNE 1820. had no right to aid their original owners in retaining them in slavery?

Baptiste
vs

De Volunbrun

Rogers, for the appellee. Protesting against the defendant's being considered as coming within the provisions or policy of any of the prohibitory laws of this state against the introduction of slaves, contended, provided this court are of a different opinion, that this case, by the very terms of the statement of facts, comes within the *fourth* section of the act of 1796, *ch.* 67. It cannot be, nor has it been contended, that this case comes within that clause of the *first* section, which prohibits an importation for sale, but it has been exclusively rested upon the ground of an intention to reside. It becomes then essentially important to the proper determination of the question, to come at the meaning intended by the legislature to be given to the term "*to reside.*" In itself it is certainly indefinite, but all doubt is removed, and its intended meaning fully explained, by the *fourth* section, which points out what description of persons should not be considered as coming within the term, viz. Travellers and sojourners. By the introduction of the term *sojourner*, it also palpably appears, that the legislature meant to exclude from the prohibition and penalty of this law, not only persons who were passing through the state, but persons whose stay here was not of a permanent nature. That the legislature, which passed this act, intended a more liberal construction should be given by courts of justice to the term *sojourners*, and that the circumstances under which they came to the state should have more effect in determining the opinions of courts of law on the question of sojournment, than the mere lapse of time, the court are requested to notice the fact, that by the *second* section of the act of 1783, *ch.* 23, which gives to travellers and sojourners the privilege of bringing their slaves into this state, that privilege is expressly limited to persons sojourning here for a *short time*. Whereas by the act of 1796, *ch.* 67, which repeals that law, the limitation of time is entirely omitted, and sojourners *generally* are declared entitled to the privilege of holding their slaves. Do the facts of this case bring the defendant within the meaning of the term *sojourner*? If they do, then is she equally within the exception, whether she came directly or indirectly from *St. Domingo*. According to that great philologist, Doctor *Johnson*, to so-

jour means "to dwell any where for a time—to live as not at home—to inhabit as not in a settled habitation. So-journ, a temporary residence—a casual and no settled habitation." Do not then the facts in this case show the defendant to have lived here as not at home? Has not this state been to her a casual, and not a settled habitation? Her coming here has been the effect of a double compulsion; first, to avoid being massacred by the insurgent negroes; and secondly, to avoid the fatal severity of a northern climate upon the constitution of a person, who had been born, and always had lived between the tropics, under a burning sun. But could facts more conclusively be stated of her character of sojourner, than the admission, that since the time of her arrival she has constantly and uniformly declared her intention to return to her own country, as soon as circumstances would permit, and that, under this expectation, she refused to become a citizen of the *United States*? But this case need not be brought within any of the exceptions in the act of 1796, since we are warranted, by the opinion of this court in *De Fontaine vs. De Fontaine*, in saying, that the unfortunate refugees from the island of *St. Domingo* do not come within the law prohibiting the importation of slaves into this state. Cases of voluntary importation come only within the provisions of that law. These unfortunate exiles were driven by a force, which they could not resist, from their homes, which was a colony of *France*. The sanguinary revolution, which at that moment raged in the mother country, only offered them the alternative of being butchered by whites, instead of blacks, should they go there; whilst this country held out to them, as it has always to oppressed humanity, in every shape and under every circumstance, the hospitality of an asylum, and they embraced it. To deprive them, under these circumstances, of the miserable pittance of property which they were able to collect at the moment of embarkation, (for their domestics constituted the principal part of it,) would be saying to them—True, you, and all the oppressed and persecuted of the world, have, as it were, a right to the common benefits of our country, but as the price of this hospitality, you must consent to be reduced to beggary. We did not inform you, though you were ignorant even of our language, that any terms or conditions were attached

JUNE 1820.
Baptiste
vs
De Volunbrun

JUNE 1820.

Baptiste
vs
De Voluubrun

to your coming, because you might, by removal, have then avoided the penalty of these terms; but there has been now discovered a latent meaning in our law, which at this day strips you of your only means of support in your old age; you may still enjoy the privileges of freemen in our land of liberty, but only on the condition of absolute poverty. We, the natives of the country, esteem it no crime in us to hold slaves; the laws give us the same absolute property in them as in our horses, but you are strangers, who must starve without the assistance of yours. If such were the decisions of our courts, might not these individuals, with some appearance of justice, accuse us of having invited them to our shores with one hand, for the purpose of stripping them with the other? Of such crying inhumanity, as well as injustice, we are happy to say, we have already been relieved by the decision of this very court in *De Fontaine vs. De Fontaine*, a case more favourable in its circumstances to the petitioners, than the present, since they were sent to this state from the island of *Cuba*, by the master, who never came to the *United States*. It cannot, therefore, for a moment be believed to be within the power of counsel, however ingenious, to point out to the court such discriminating circumstances between the two cases, as to induce it to pronounce the present petitioners free men, after having determined those in the case of *De Fontaine vs. De Fontaine* to be slaves.

BUCHANAN, J. delivered the opinion of the court.

The claim of the appellants to freedom is founded on the *first* section of the act of assembly of 1796, *ch.* 67, by which it is enacted, "that it shall not be lawful to import or bring into this state, by land or water, any negro, mulatto, or other slave, for sale, or to reside within this state; and any person brought into this state as a slave, contrary to this act, if a slave before, shall thereupon immediately cease to be the property of the person or persons so importing or bringing such slave within this state, and shall be free." The object of the law was to prevent an increase of the number of slaves in the state by voluntary importation; and it cannot be presumed, that the legislature contemplated the extreme case of fugitives for their lives from the horrid scenes of slaughter in *St. Domingo*, during the servile wars in that island; or if they were thought of, they were intended to be embraced by the *fourth* section, which

contains a saving of the "rights of any person or persons JUNE 1820. travelling, or sojourning, with any slave or slaves, within this state." The mere bringing slaves into the state is manifestly not prohibited. There must be something else; they must be brought "for sale or to reside." The *animus quo* fixes the character of the act; and if they are not imported or brought into the state for either of those purposes, it is neither within the letter, nor the spirit of the law. The intention must accompany the act; and though, where a man voluntarily brings slaves into the state, the presumption of law is against him—yet the law will never intend, that he who is forced to fly from his country, by causes not within his control, and with his slaves seeks refuge here, brings them either for sale or to reside. A man arriving here, under such circumstances, must be supposed to come without any purpose beyond that of saving himself and his property, and the presumption is decidedly against his bringing his slaves with any intention to violate the laws of the state.

Baptiste
De Volunbrun

The doctrine of necessity is well known to the law, and not now, for the first time, set up. The defendant in the case before us was driven to this country from *St. Domingo* by an insurrection of the negroes, and brought with her the petitioners, as her slaves; she was compelled to come by necessity, a *vis major*, which she could not resist, and that necessity is her protection. But it is said, that she first arrived at *New York*, and though she may have been driven by necessity from *St. Domingo*, the same necessity did not pursue her, after she reached *New York*, where she might have remained in safety, and that her coming into this state was a voluntary act. The answer to that argument is, that it appears, from the case stated, that she moved from *New York* to *Baltimore*, in consequence of the climate of the former being injurious to her health. She therefore had no choice, between becoming a sacrifice to the climate of *New York*, and going to some other place better suited to her constitution. It is, moreover, admitted, that she "has constantly and uniformly declared her intention to return to her own country whenever circumstances will permit her to do so with safety," and for that reason has never become a citizen either of this state, or any other of the *United States*. These declarations must be taken as a part of the *res gesta*, and are evidence of her

JUNE 1820. intention, and with the fact, that she has never become a citizen, are conclusive. She is a stranger in the country—an alien, without a fixed home—a sojourner wherever she goes, awaiting some favourable event, that may invite her back to the land from whence she has been driven. Under such circumstances, we think that her coming into this state from *New York* cannot affect her rights, or deprive her of any privileges to which she would have been entitled if she had come immediately from *St. Domingo* to *Baltimore*.

Baptiste
vs
De Volunbrun

This cannot well be distinguished from the case of *De Fontaine vs. De Fontaine*, decided in this court at the June term 1818. In that case, M. and Madame *De Fontaine* were driven from *St. Domingo* by an insurrection of the negroes. He fled to the Island of *Cuba* with his two slaves, the petitioners, and she to *Baltimore* with her infant son. In the year 1805, he sent the two slaves to his wife and son in *Baltimore*. In 1808, Madame *De Fontaine* returned to *St. Domingo*, leaving her son, and the two slaves, whom she put into the hands of *Bonard*, under an agreement that they should be considered as a pledge for the return of a sum of money that he had advanced to her, and which she did remit. After she had gone, the negroes filed their petition for freedom in the court of oyer and terminer, &c. in *Baltimore*, where it was adjudged, that they were not entitled to their freedom; and on an appeal to this court, the judgment was affirmed.

In the course of his argument, the counsel for the appellants read, from *Bains's* history of the wars of the *French* revolution, an extract of a decree of the National Convention of the 25th of April, in the second year of the *French* republic, "which declares, that negro slavery, in all the colonies, is abolished," and earnestly contended, that as that decree was passed before the defendant was driven from *St. Domingo*, the petitioners were thereby liberated, and no longer remained the slaves of their former owner. But as foreign laws are facts, which, like other facts, must be proved before they can be received as evidence in courts of justice, the decree of the National Convention must be considered as not in the case, not being proved in any other way than by the book from which it was read, and no attempt to obtain an authentication of it appearing to have been made. It is not, therefore, necessary to inquire, what

would be the effect of that decree, if it was properly before us. JUNE 1820.

JUDGMENT AFFIRMED(a).

Baptiste
vs
De Volunbrun

(a) The case of *DE FONTAINE et al. vs. DE FONTAINE*, by BONARD his Guardian, in this court at June term 1818, and referred to in the preceding case, was an *Appeal* from the court of Oyer and terminer, &c. for *Baltimore* county. It was a petition for freedom preferred by the appellants, and the case was submitted to the court below upon this statement of facts, viz.

That M and Madame *De Fontaine*, the lawful parents of *Faustin De Fontaine*, the defendant, a minor, were driven from their estate in the island of *St Domingo*, by an insurrection of the negroes; and being in different parts of the island at the moment of the insurrection, the husband fled to *St. Jago*, in the island of *Cuba*, carrying with him his two slaves, the present petitioners, whilst the wife fled to *Baltimore* with their only child and heir, the present defendant. That towards the latter end of the year 1805, *De Fontaine*, the father, in consequence of the persecution of the French inhabitants in the island of *Cuba*, found himself compelled to leave that country, and being a military man, joined the French army under Ferrand, at *St. Domingo*, in hopes of recovering his former possessions by arms. That at his departure it not being possible to take them with him, he shipped the petitioners to his wife and child, in *Baltimore*, where they arrived in 1805, and have since continued. That Madame *De Fontaine* was frequently desirous of leaving this state to join her husband, and at one period was on the point of doing so, with her child and the petitioners, but learnt at that moment that *St Domingo* was besieged by the blacks, and that her husband had fallen a sacrifice to the war. That, at length, in November 1806, finding herself and family without the means of existence, she left this place for *St. Domingo*, in hopes of collecting the little property her husband might have died possessed of at that place, where she now resides. That at her departure, not finding herself possessed of a sufficiency to pay her son's, and the petitioners' passage, and that by the death of her husband she had lost all hope of recovering his fortune for her son, she determined on putting him to school three or four years, and then binding him to a trade. That for the purpose of accomplishing this object, as her only means, she left the petitioners, who are the defendant's property, in care of a certain Mr. *Bonard*, her agent, in order that they might, by their services, afford him the conveniences of washing and clothing, and by their wages support their other expenses. That *Bonard*, in pursuance of Mrs *De Fontaine's* direction, placed the defendant during three or four years at school, both in *Philadelphia* and *Baltimore*, and in December 1814, bound him an apprentice for three years, (at the end of which period he will be of age,) to Mr *Glasgow*, cordwainer of *Baltimore*, who in consideration of the period when he was bound, it being during the war, refused taking him, without a fee of fifty dollars, and *Bonard* paying all expenses, except his shoes and board, which have been paid out of the wages of the petitioners. That *Bonard* has the instructions of the mother to ship her child and the petitioners to her at *St. Domingo*, as soon as her son's apprenticeship is terminated, or sooner if his time can be purchased. That Madame *De Fontaine*, not being able to pay the debts she had contracted in *Baltimore* or the price of her passage, *Bonard*, from motives of humanity, advanced her money sufficient for the purpose; and that *Bonard*, expressing some apprehension for the payment of his money, Madame *De Fontaine* agreed that the petitioners should be considered as a pledge for the remission of his money to him from

JUNE 1820.

COURT OF APPEALS, JUNE TERM, 1820.

Davis
vs
Jacquin, &c

DAVIS vs. JACQUIN & POMERAIT.

Whether the owner of a slave has been a sojourner in *Pennsylvania* with such slave, and has sent him away within six months, within the meaning of the statute of that state of 1780, *ch.* 870, are facts to be left to the jury.

Where the laws of this state, and of any other, differ, the court here is bound to administer the former.

If a slave, belonging to a citizen of this state, should be declared free by the judgment of a court of competent jurisdiction in *Pennsylvania*, when he would not be entitled to freedom under the laws of this state—*Quere*—whether such judgment would be binding here?

By the act of 1798, *ch.* 101, the disabilities of infancy are not removed, except in the particular cases therein expressly provided.

A female under the age of 21, cannot dispose of her personal property, though entitled to the possession of it at 16.

APPEAL from *Baltimore* city court from a judgment in that court, on a petition for freedom. The petitioner, (the appellant,) claimed his freedom under the laws of *Pennsylvania*; and, to support his claim, proved to the jury, that he was, in September 1813, the property of Miss *Eleanor Davidson*, who was the step-daughter of *J. Pinkney*, and lived and resided in his family, in *Baltimore*. That on the 25d of September 1813, *Pinkney* removed to *Carlisle*, in *Pennsylvania*, where he has resided ever since. That Miss *Davidson* went with *Pinkney* to *Carlisle*, when he moved his family there, and lived with him about two years before she returned to this state. That at the time *Pinkney* moved to *Carlisle*, he took with him the petitioner, and kept him there, as a servant in his family, until the 24th of February 1814, when he was sent back to *Baltimore* from *Carlisle*, and in 1818 was sold to the defendants by *R. Casey*, the agent of Miss *Davidson*, and after she had arrived at the age of 21 years. The petitioner further offered in evidence two acts of the legislature of *Pennsylvania*, to wit, the acts of 1780, *ch.* 870, and of 1788, *ch.* 1334. The defendants then proved to the jury, that Miss *Davidson*, at the time she went to *Carlisle* with *Pinkney*, was under the age of 21 years; being only 17 years old; that she then held, and now holds, real and personal property in this state, and is a native thereof. That she has a number of relations residing in this state; and has alternately resided in *Pennsylvania*, and in this state, since her first removal to *Carlisle*, and has spent two winters in *Annapolis* since 1813. That she was never consulted on the petitioner's being carried to *Pennsylvania*, and never gave her consent, or any authority to *Pinkney*, or any other person, to carry the petitioner to that state. The petitioner, by *St. Domingo*; which has been done. That *Faustin De Fontaine*, the defendant, is the only legitimate heir of his parents, and was alone entitled to the petitioners at the death of his parents; provided, they should not be considered by this court as emancipated by the laws of this state. Upon this statement, judgment was rendered for the defendant in the court below, and the case was brought by appeal to this court. It was argued before *Buchanan*, *Earle*, *Johnson*, *Martin* and *Dorsey*, J. by *Raymond*, for the appellants, and by *Martin* (attorney general) for the appellee, who cited *De Kerlegand vs. Negro Hector*, 3 *Harr. & M'Hen* 185. THE COURT OF APPEALS affirmed the judgment of the court below.

his counsel, then prayed the court to instruct the jury, JUNE 1820. that upon the whole matter, as above stated in evidence, he was entitled to his freedom. But the court, [Brice, Ch. J. and M'Mechen, A. J.] refused to give the instruction, but gave the jury the following direction:— That if they should be of opinion that Miss *Eleanor Davidson* was under 21 years, and a sojourner in the family of *Pinkney*, her father-in-law, in *Pennsylvania*, and sent the petitioner back to this state within six months from the time of carrying him to *Pennsylvania*, they ought to find a verdict for the defendants; or, if they should be of opinion, that *Pinkney*, without the consent or authority of Miss *Davidson*, and during her infancy, carried the petitioner to *Pennsylvania*, and sent him back to this state within six months thereafter, they ought also to find a verdict for the defendants. The petitioner excepted, and the verdict and judgment being against him, he appealed to this court.

Davis
vs
Jacquin, &c

The case was argued before BUCHANAN, EARLE, JOHNSON and DORSEY, J.

Raymond, for the appellant. By the *tenth* section of the act of *Pennsylvania* of 1780, *ch.* 870, referred to in the bill of exceptions, it is enacted, “that no man or woman, of any nation or colour, except the negroes or mulattoes who shall be registered as aforesaid, shall, at any time hereafter, be deemed, adjudged or holden, within the territories of this commonwealth, as slaves or servants for life, but as free men and free women, except the domestic slaves attending on the delegates in congress from the other *American* states, foreign ministers and consuls, and persons passing through or sojourning in this state, and not becoming residents therein, and seamen employed in ships not belonging to any inhabitant of this state, nor employed in any ship owned by any such inhabitant; provided such domestic slave be not alienated or sold to any inhabitant, nor (except in case of members of congress, foreign ministers, and consuls,) retained in this state longer than six months.” This law was amended by an act passed in 1788, *ch.* 1334, which declares “that the exception contained in the *tenth* section of the aforesaid act, relating to domestic slaves attending upon persons passing through or sojourning in this state, and not becoming resident therein, shall not be deemed or taken to extend to the slaves of such persons as are inhabitants of or resident in this state, or who shall come

JUNE 1820. here with an intention to settle and reside; but that all and every slave and slaves, who shall be brought into this state by persons inhabiting or residing therein, or intending to inhabit or reside therein, shall be immediately considered, deemed and taken, to be free, to all intents and purposes." Our act of assembly passed in 1798, *ch. 101, sub ch. 12, s. 1, 15*, provides, that guardianship of female infants shall cease at sixteen years of age, and that "on the ward's arriving at the age aforesaid, the guardian shall exhibit a final account to the orphans court, and shall deliver up, agreeably to the court's order, to the said ward, all the property of such ward in his hands, including bonds, and other securities; and on failure, his office bond shall be liable, and he shall also be liable to attachment and fine." The petitioner founds his claim to freedom upon these acts of assembly; and the main question is, whether Miss *Davidson*, at the age of 17 years, was an infant, or of full age, under the laws of this state. If an infant, then it is admitted that she could do no act to prejudice her property in this slave, nor could the act of Mr. *Pinkney*, her step-father, affect her rights. The law has been so settled. But if she was of full age, under our act of assembly, so as to have the complete and absolute control of her property, then could she make a legal disposition of her slaves, and by consenting that the petitioner should go to *Pennsylvania* to reside, did such an act as, under the laws of that state, entitles him to his freedom; and any right which the petitioner may have acquired in *Pennsylvania* will be recognised by this court. See *Negro David vs. Porter*, 4 *Harr. & M'Hen.* 418. Was Miss *Davidson* then, at the age of 17 years, of lawful age to do an act which should enure to the freedom of the petitioner? If so, then is the opinion of the court below, and their instruction to the jury, erroneous; for that opinion requires, that the jury should find Miss *Davidson* to have been 21 years old at the time the petitioner was taken to *Pennsylvania*, in order to be entitled to his freedom, and indeed the opinion is erroneous at any rate; for it requires the jury to find that the petitioner remained in *Pennsylvania* six months in order to be entitled to his freedom, which is in direct opposition to the statute of *Pennsylvania*, which provides, that slaves brought into the state, by persons coming there to reside, shall immediately become free to all intents and purposes; and from

Davis
vs
Jacquin, &c

the facts proved, it was certainly competent for the jury to find, that Miss *D.* did go to *Pennsylvania* to reside. She did in fact reside there two years before she returned to this state at all, and it continued to be her home for several years afterwards. If then the jury should have been of opinion, from the evidence, that Miss *D.* went to *Pennsylvania* to reside, then was the petitioner free the moment he set foot in the state, provided Miss *D.* legally could and did consent to his going. Under our act of assembly, guardianship of female wards ceases at the age of sixteen years, and the act requires all her property then to be delivered into her possession. The necessary consequence is, that the disabilities of infancy must also cease at that age; for it would be a strange absurdity to invest a female at that age with the legal possession of her property, and at the same time impose on her the legal disabilities of infancy, so as to disable her from making any use or disposition of that property. The object of the statute was to confer a privilege upon females—to make a distinction between males and females—guardianship of males continues till 21—that of females ceases at sixteen; but to withdraw the protection of a guardian from females, without conferring on them the right of acting for and protecting themselves, would be to put them without the pale of law. If a female, at the age of sixteen, is to have the legal possession of her property without the legal ability to use it, or bind herself by contract respecting it, then must her lands lie waste for the want of culture, for no man would rent them of her, for her contracts would be voidable; and any person who should enter upon them, in pursuance of such contract with her, would be liable to be turned off at pleasure. Her slaves must go at large, because she could not contract for their hire—her personal property must lie useless on her hands, because she could make no contract to dispose of it—Her bonds and notes must remain uncollected, because she could not bring suits for their collection; for an infant cannot sue, except by guardian, and she has none; and the law says she shall have none; and it seems absurd to say she may sue by *prochein ami*, when the law says she shall have no guardian.

Miss *D.* must, therefore, be considered of full age at sixteen. The disabilities of infancy were then removed, so far as relates to her property, and she had a legal capa-

JUNE 1820.

Davis
vs
Jacquin, &c

JUNE 1820.

{
 Davis
 vs
 Jacquin, &c

city to bind herself by contract at that age. She could then make a final settlement with her guardian, which would bind her. She could have manumitted the petitioner by deed—could have sold him, and of course could assent to his going to *Pennsylvania*. Our act of assembly of 1796, *ch. 67, sec. 29*, provides, “that any person *possessed* of any slave or slaves of healthy constitution, &c. may, by writing under his, her, or their hand and seal, evidenced, &c. grant to such slave or slaves his, her, or their freedom.” It must be presumed, that the legislature used the word *possessed*, in this statute, in the same sense that they used equivalent words in the testamentary system above quoted, where they say, “the guardian shall deliver up to the said ward, all the property of the said ward;” which is equivalent to saying, the ward shall have the possession of her property. If this be so, then was Miss *D.* at the age of sixteen, competent to execute a deed of manumission to the petitioner, by the express provision of the statute; and if competent to give her assent to a deed of manumission, then was she competent to give her assent to the petitioner’s going to *Pennsylvania*. Whether it was wise, or unwise, for the legislature to remove the disabilities of infancy, from females, at the age of sixteen, is foreign to the present question, nor can it ever be proper to discuss such a question before this tribunal. It is the duty of this court to administer the law, and not to make it. The legislature has said, that guardianship of female wards shall cease at sixteen years of age, and that their property shall then be delivered into their possession. The plain and obvious meaning of this language is, that infancy, and the disabilities of infancy, shall then cease, in regard to their property; and that courts of justice are bound to give it this construction, is manifest from the absurdity and mischiefs of a different construction. The first branch of the opinion of the court below, is therefore erroneous, because it requires the jury to find that Miss *Davidson* was 21 years of age at the time the petitioner was sent to *Pennsylvania*, and that he remained there six months, before they could find that he was free. The second branch of the opinion is erroneous, for the same reason, for although it leaves the question to the jury, whether the petitioner was taken to *Pennsylvania* with or without the authority and consent of Miss *D.* still the question as to infancy, (although obscure-

ly expressed,) and the question as to sending back to this state, within six months, is put upon the same ground in this as in the former branch of the opinion; whereas the direction of the court to the jury should have been, that if they believed from the evidence that Miss *D.* was sixteen years of age, or upwards, and went to *Pennsylvania* to reside, and that the petitioner was taken there by her authority, or with her knowledge and consent, then they must find that the petitioner is free.

JUNE 1820.
 Davis
 vs.
 Jacquin, &c.

Pinkney, for the appellees. The act of 1796, *ch. 67, s. 7*, is in the disjunctive, and gives rise to two questions: 1. Whether or not Miss *Davidson* was an infant; and 2. If she was not an infant, was the petitioner removed to *Pennsylvania* without her consent or authority? The act says, if she was an infant, the law of *Pennsylvania* could not operate. She had only a capacity to do particular acts under the age of 21, and must be considered an infant for all other purposes. An infant may contract for necessaries. So a married woman, by contract, may make her will—Still she is a *feme covert*. These are exceptions out of the cases of infancy and *femes covert*, but do not affect the general law with regard to them. A female infant may take her property at the age of 16, but she can do no act to prejudice herself. The law guards and protects her. Her general character of infancy remains until she is 21—while under that age, no matter how many exceptions are carved out, still she is an infant. The law enables her to make beneficial contracts, but none to prejudice her. If then she did consent that the petitioner should be taken to *Pennsylvania*, it cannot affect her. If she is within the exception of the act of 1796, the laws of *Pennsylvania* cannot apply to her. *Smith vs. Williamson*, 1 *Harr. & Johns.* 147. *Hancy vs. Waddle*, in this court, May 1815. *Mahoney vs. Ashton*, 4 *Harr. & M'Hen.* 323.

Raymond, in reply. It has been said that Miss *Davidson* was an infant, and that the law was her guardian. The law is a guardian to us all. Where any person is defrauded, the law is his guardian to protect his rights. Miss *Davidson* might, by her will, have manumitted the petitioner, and if so, she could send him to *Pennsylvania*, that he might thereby become free under the laws of that state.

JUNE 1820. The act of 1796 speaks of slaves being carried out of the state by other persons than an executor, &c. but it says nothing of the infant herself carrying or sending the slave out. If then she did send the petitioner out of the state, she is not within either the letter or spirit of that act.

Davis
vs
Jacquin, &c.

JOHNSON, J. The general court, in the case of *Lowe vs. Gist*, decided, that a female, at the age of 18 years, could not execute a bill of sale of her slaves (*a*).

A bill of sale executed by a female under the age of 21 years, but above the age of 16, is voidable by her on her arrival at the age of 21.

(*a*) *Lowe vs. Gist*, General Court, May term 1798. 'This case came up on a writ of error to *Prince-George's* county court, and was an action of *replevin*, brought by the plaintiff in error, for a negro slave named *Charles*. The defendant pleaded *non cepit* and *property*, and issues were joined. At the trial the plaintiff offered in evidence a deed of indenture, dated the 23d of August 1774, executed by *Harry, Ann, and Mary Ann Lowe*, to *Enoch Magruder* and *Michael Lowe*, and duly acknowledged and recorded, whereby, in consideration that *Magruder* and *Lowe* had engaged and undertaken to pay and satisfy to several creditors of *Harry, Ann* and *Mary Ann Lowe*, and in consideration of five shillings current money, they, in order to secure and save harmless and keep indemnified *Magruder* and *Lowe*, conveyed and transferred to them certain parcels of land, and several negro slaves, and amongst others the negro slave mentioned in the declaration in this cause; covenanting, that *Magruder* and *Lowe*, their heirs, &c. might enter into and take possession of the lands and negroes, or any of them, and the same, or any of them, to sell and dispose of at private or public sale, and when sold, convey and transfer to the purchaser, &c. It was admitted by the parties, that the negro slave named *Charles* was, at the execution of the indenture, the property of *Mary Ann Lowe*, and that after the execution of the said indenture she intermarried with *John Gist*, the defendant; and that she was, at the time of the execution of the said indenture, under the age of *twenty-one* years, and above the age of *sixteen* years. The plaintiff then prayed the direction of the court to the jury, that if the said *Mary Ann Lowe*, at the time of the execution of the said indenture, was above the age of *sixteen* years, although she was under the age of *twenty-one* years, that the said indenture was good and available in law to pass the said negro slave named *Charles*, and that said indenture could not be avoided by her, or those claiming under her, on account of the non-age aforesaid. But the county court, [*Stone, Ch. J.*] refused to give this direction; but directed the jury, that if they were of opinion that *Mary Ann Lowe*, at the time of the execution of the indenture, was under the age of *twenty one* years, and above the age of *sixteen* years, that then the indenture, in point of law, was voidable by her, and that she, after her full age, and before her intermarriage, and that she and her husband after her intermarriage, might legally avoid it, if it had not been confirmed by her after her coming of age, or by her husband after their intermarriage. To this opinion the plaintiff excepted; and the verdict and judgment being for the defendant, the present writ of error was brought by the plaintiff.

Kilty, Nicholls, and Buchanan, for the plaintiff in error.

Key and Shaaff, for the defendant in error.

THE GENERAL COURT affirmed the judgment of the County Court.

DORSEY, J. cited *Stewart vs. Oakes*, decided in this JUNE 1820. court under the laws of *Virginia*(b).

Davis
vs
Jaquin, &c

The opinion of the court was delivered by

DORSEY, J. [After recapitulating the facts, he proceeded:]

The court below gave the two following hypothetical directions to the jury, that if they should be of opinion, that Miss

(b) *Stewart vs. Oakes*. Court of Appeals, December Term, 1813. It was an appeal from the Court of Oyer and Terminer, &c. for *Baltimore* county, from a judgment rendered in that court on a petition preferred by the present appellee, claiming his freedom because of his having been removed by the defendant, (the appellant,) from this state into the state of *Virginia*, and thence imported into this state. There was a verdict for the petitioner, subject to the opinion of the court on the following case, viz. It is admitted that negro *Robert*, the petitioner, was the slave of the defendant, who is a citizen of this state, and resided therein prior to the 10th of January 1783, and has resided there ever since. That he owns a stone quarry in the state of *Virginia*, where he has been in the habit of taking the petitioner, for the purpose of working in the quarry, for a number of years past, four or five weeks in the spring of every year, making the time of the petitioner's being in *Virginia*, in the whole, upwards of one year. The defendant never resided in *Virginia*, except for the purpose of quarrying stones as aforesaid, and always returned to this state, (where his family constantly remained,) as soon as he got a sufficient number of stones to supply his manufactory at *Baltimore*. That the record annexed, contains a true and just copy of the laws of *Virginia* relative to slaves; and that the petitioner never applied to any court of record or competent tribunal in *Virginia*, for the purpose of obtaining his freedom under the laws of that state. The petitioner was always brought back to this state by the defendant without being compelled thereto by any force or violence; and that the several times herein before mentioned, in which the petitioner remained in *Virginia*, were subsequent to the passage of the above mentioned law of *Virginia*. The petitioner was taken by the defendant in the month of March 1801, to said quarry, for the purpose of quarrying, and remained there until the month of August following, when he returned to this state, where he continued about two weeks, and again returned to *Virginia*, and remained working at the quarry until November following, when he again came back to this state.

A slave carried at different periods to *Virginia*, by his owner residing in this state, and employed in working at his stone quarry, the several periods amounting in the whole to one year, such slave is entitled to his freedom under the laws of *Virginia*.

By the law of *Virginia*, referred to in the above statement, passed on the 17th of December 1792, ch 103, s. 2, "Slaves which shall hereafter be brought into this commonwealth, and kept therein one whole year together, or so long at different times as shall amount to one year, shall be free." By the fourth section, it is provided, "that nothing in this act contained shall be construed to extend to travellers, and others, making a transient stay, and bringing slaves for necessary attendance, and carrying them out again."

THE COURT OF OYER AND TERMINER, &c. [*Dorsey*, Ch J.] gave judgment on the case stated for the petitioner. From which the defendant appealed to this court.

The case was argued here before CHASE, Ch. J. BUCHANAN, NICHOLSON, EARLE and JOHNSON, J. by *Purviance* for the appellant, and T. BUCHANAN for the appellee.

THE COURT OF APPEALS affirmed the judgment of the court of oyer and terminer, &c.

JUNE 1820. *Davidson* was under twenty-one years of age, and a sojourner in the family of *Pinkney*, (her father-in-law,) in *Pennsylvania*, and sent the petitioner back to this state within six months from the time of carrying him to *Pennsylvania*, they ought to find for the defendants; or if they should be of opinion that *Pinkney*, without the consent or authority of Miss *Davidson*, and during her infancy, carried the petitioner to *Pennsylvania*, and sent him back to this state within six months thereafter, they ought to find a verdict for the defendants.

Davis
vs
Jaquin, &c

By referring to the statutes of *Pennsylvania*, to wit, the *tenth* section of the act, entitled, "An act for the gradual abolition of slavery," passed in the year 1810, *ch.* 870, and the *second* section of the act, entitled, "An act to explain and amend an act, entitled, An act for the gradual abolition of slavery," passed in the year 1788, *ch.* 1334, it will be found, that the legislature of that state have, by express words declared, that the domestic slaves of persons, sojourning in that state, shall not be emancipated from bondage, provided such slaves be not alienated or sold to any inhabitant of that state, nor retained in the state longer than six months. Whether Miss *Davidson* was a sojourner in *Pennsylvania* during the time the petitioner remained there, and if she was, whether the petitioner was sent back to this state within six months after being carried into *Pennsylvania*, were facts proper for the consideration of the jury, and were by the court referred to their determination. And if such were the facts, the petitioner can have no claim, under the laws of *Pennsylvania*, to his freedom. And as the court below did so declare, they did not err in the direction first given by them to the jury.

Let us now examine whether the other opinion was erroneous.

The *seventh* section of the act of assembly of this state, entitled, "An act relating to negroes, and to repeal the acts of assembly therein mentioned," passed in the year 1796, *ch.* 67, declares, "that if any negro, or other slave, hath been, or may hereafter be, carried out of this state by an executor, administrator or guardian, or by any other person or persons, during the infancy, or without the consent or authority of the real owner or proprietor of such negro, or other slave, it shall and may be lawful for such

proprietor or owner, at any time thereafter, to bring said negro, or other slave, into this state again, and have and enjoy the said negro or other slave as his property." This act, therefore, most explicitly declares, that the right of an infant, in his negro slave, shall not be divested by his being carried out of the state by any person whatever. This being the law, it would be useless to consider, what would be the operation of the laws of *Pennsylvania* in such a case. If the legislative enactments of this state and another state should differ, it cannot be made a question here which shall prevail. Where there is no constitutional barrier, we are bound to observe and enforce the statutory provisions of our own state. What would have been the legal effect of a judgment rendered in *Pennsylvania*, declaring the petitioner to be free, (if such a judgment had been rendered,) the court do not mean to decide.

JUNE 1820.
 Davis
 vs
 Jacquin, &c

It has been urged by the appellant's counsel, that Miss *Davidson* was not an infant at the time the petitioner was carried to *Carlisle* by *Pinkney*, she then being seventeen years of age, and the legal infancy of females ceasing at the age of sixteen. That the minority of females did not cease at that age, under the principles of the common law, is a proposition too clear for inquiry. But it is said, that the act of 1798, *ch.* 101, has made an alteration in the common law; and the appellant, in support of this position, has relied on that part of the act, which declares that the orphans court shall appoint guardians to females until the age of sixteen, or marriage; and that on the female attaining such age, the guardian shall deliver up to her all the property of his ward, including bonds, and other securities. That this act has not, in terms, declared, that the infancy of females shall cease at the age of sixteen, will be admitted; and it is difficult to conceive why the legislature, if they intended to destroy this important feature of the common law, did not pointedly declare their intention, instead of leaving it to be inferred by reasoning. That such was not their intention, with reference to all females, is most evident, because they refer to, and acknowledge the validity of testamentary guardianships created under the statute of 12 *Charles II*, *ch.* 24; and it is well known that parents under this statute may appoint guardians to their female children, until they arrive at the age of twen-

JUNE 1820. ty-one years. It may be asked, why make this distinction?

Davis
vs
Jacquin, &c

If the common law principle operated unkindly on the female sex, why emancipate a part of them from its disabilities, and leave the rest to suffer under its uncourteous restraints? The object of the law was to enable an infant female, at the age of sixteen, to receive from her guardian, and take into her possession, her real and personal estate. So far the law conferred on her a new capacity; but this capacity does not destroy the state of legal minority, because it is consistent with it. While the law gives to her the power of receiving the possession of her property, it is silent as to the *jus disponendi*, except in the instance of devising her real estate, which she is empowered to do at the age of eighteen. If her infancy ceased at sixteen years, why, I pray, withhold from her the power of disposing of her lands by will before eighteen? If she ceases to be an infant at sixteen, she may immediately thereafter convey her lands by deed; and thus the strange inconsistency is introduced, that a female has legal capacity to convey her land by deed, when she is sixteen years of age, but cannot devise them before she arrives at the age of eighteen. Neither is the provision of the act, which incapacitates persons under the age of eighteen from acting as administrator, consistent with the notion of the appellant's counsel.

It has been further urged, that infants are bound to sue by guardian, and as the guardianship ceases at sixteen, their infancy must cease at the same time, or they are deprived of the capacity of suing. This argument is founded on a twofold error; first, by supposing that an infant can only sue by guardian; and secondly, that the guardian of the person must be the guardian *ad litem*. By the common law, infants were obliged to sue by guardian; but they were enabled by the statute of *Westminster* the 2d. to sue by *prochein amy*; and the guardians of the person, and guardians *ad litem*, are essentially different in their creation and powers. The power of appointing the latter is incident to all courts, and they are admitted by the court for the particular suit, on the infant's personal appearance, without inquiring whether the person admitted is the guardian of the person of the plaintiff. *Coke Litt.* tit. *Socage*, §. 123, *Note* 16.

How far the rights of Miss *Davidson*, if she had been adult, would have been affected by the acts of her father-in-law, the court do not mean to decide.

JUNE 1820.
 Negro Clara
 vs
 Meagher

The court are of opinion, that there is no error in the second opinion delivered by the court below.

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1820.

NEGRO CLARA vs. MEAGHER.

APPEAL from *Baltimore* city court from a judgment rendered on a petition for freedom, *dismissing* the petition. At the trial the petitioner, by his counsel, offered in evidence a deed of manumission executed by *Prettyman Boyce*, of *Sussex* county, in the state of *Delaware*, on the 12th of October 1801, in which he stated that he set free from bondage his negro *Cursy*, daughter of *Annes*, who was born in 1794, to be free as above when she comes to be 18 years of age. The deed was signed, sealed and delivered, in the presence of *Asahel Phelps* and *Daniel Baker*, the former of whom, on the 18th of November 1801, in a court of common pleas held for *Sussex* county, "made oath, in due form of law, that he saw the grantor sign, seal and deliver, the deed; that he subscribed his name to it as a witness, and saw *Daniel Baker* subscribe his name as another witness." The copy was certified by the recorder of *Sussex* county to be a true one taken from the record thereof remaining on the rolls office for the said county. It was also certified by the secretary of state of *Delaware*, that the person, a copy of whose name is subscribed to the certificate of the proof of the execution of the deed of manumission, was at the date thereof Prothonotary of the Court of Common Pleas of the state of *Delaware*; and that the person whose name is subscribed to the certificate of the copy of the rolls, &c. was and is recorder of deeds in and for *Sussex* county. It was also certified by the chief justice of the court of common pleas of said state, that the attestation by the recorder of deeds, &c. is in due form, and by the proper officer. There was also the certificate of the secretary of state of *Delaware*, that the person who certified as chief justice, &c. was such, &c. And the certificate of the prothonotary of the court of common

Under the act of Assembly of *Delaware* of 1797, ch. 124, a deed of manumission, to be valid, must be attested by the subscribing witness, in the presence of the grantor, though it is not necessary that that fact should appear by the certificate of the attestation itself; it may be proved by evidence aliunde.

JUNE 1820.

Negro Clara
vs
Meagher

pleas of *New-Castle* county, that the person who certified as chief justice, &c. was such, &c. It was admitted that the petitioner is the person mentioned in the deed of manumission. The act of assembly of *Delaware*, which authorised the executing deeds of manumission of slaves, passed on the 18th of January 1797, *ch.* 124; and those parts of the act which are material in this case are as follows: *Section 2.* "That all and every manumission of any negro or mulatto slave shall be in writing, and signed and sealed by the master or mistress manumitting such slave, and shall be attested and subscribed, in the presence of such master or mistress, by one or more competent and credible witnesses, or else such manumission shall be utterly void and of none effect." *Section 3.* "That it shall and may be lawful for any master or mistress named in such manumission, which shall be signed, sealed, attested and subscribed, as aforesaid, in his or her proper person, or by his or her attorney for that purpose appointed, to appear before the supreme court, or before the court of common pleas, or before the chancellor, or any judge or justice of the peace in the county in which such master or mistress reside, at any time after the execution of such manumission, and acknowledge that such manumission is the act or deed of such master or mistress; and in case such master or mistress be dead, or cannot appear, it shall and may be lawful for any one or more of the witnesses, who attested and subscribed such manumission, to be brought before the supreme court, or court of common pleas, or before the chancellor, or any judge or justice of the peace, which witness or witnesses shall be examined upon oath, or affirmation, to prove the execution, and their attestation and subscription of the manumission then produced; whereupon the clerk or prothonotary of the said court, under his hand, and the seal of his office, or the said chancellor, judge, or justice of the peace, under his hand and seal, shall certify such acknowledgment or proof upon the back of the manumission as aforesaid, within the year, when the same was made and by whom; and every such manumission, so acknowledged or proved, shall be recorded in the office for recording of deeds, after the execution thereof," &c.

The case was argued in this court before BUCHANAN, EARLE, JOHNSON and DORSEY, J. by

Raymond, for the appellant, and

R. Johnson, for the appellee.

JUNE 1820.

M'Laughlin
vs
Long

DORSEY, J. delivered the opinion of the court.

The only question in this case is, whether the paper produced and offered in evidence by the appellant is legal evidence of his title to freedom? And the solution of this question depends on the act of assembly of the state of *Delaware*, passed in the year 1797, *ch.* 124. (He here read the sections before set forth.)

The language of the act is imperative, that the subscribing witness or witnesses shall attest the deed of manumission in the presence of the grantor. If such attestation is not made, the deed is inoperative. The court do not consider it necessary that the witnesses should certify, by their attestation, that they did attest the deed in the presence of the grantor, but the fact must be proved, if capable of proof; and it is capable of being proved, if the witnesses are alive; and as it does not appear by the record that they are dead, there can be no presumption in favour of the deed. *Croft vs. Pawlet*, 2 *Strange*, 1109. *Brice vs. Smith*, *Willes's Rep.* 1.

The proof made by the subscribing witness, before the Court of Common Pleas held for *Sussex* county, does not establish the point that the witness did attest the deed in the presence of the grantor. He proves that he saw the grantor sign, seal and deliver the deed, and that he subscribed his name thereto as a witness; and this proof is perfectly consistent with the idea that the witness did not attest it in the presence of the grantor.

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1820.

M'LAUGHLIN vs. LONG.

APPEAL from *Baltimore* county court. The appellant, (the plaintiff in the court below,) brought an action of trespass on the case against the appellee, to recover damages for an injury sustained by the plaintiff from a tortious act of the defendant, in committing *waste* upon premises of which the plaintiff was a lessee for years. A verdict was found for the plaintiff, subject to the opinion of the court, upon the following case, viz. The plaintiff had rented, for

An action on the case, in nature of *waste*, can only be brought by a reversioner or remainder man in fee simple, fee tail, for life, or for years.

JUNE 1820. ^{M'Laughlin}
vs
Long one year only, the room mentioned in the declaration, wherein the waste was alleged to have been committed, and held the same as tenant only for one year, and rented it to the defendant for two years. The contract of renting to the defendant was in writing, and delivered to him at the time it was made. That said room was part of a tenement which the plaintiff had rented for one year, and held as tenant for that time; and at the period of renting it to the defendant, the plaintiff took upon himself the chance of renting the same from the owner of the freehold estate to which it belonged, for a second year. That the defendant occupied the room for nine months, and during that time the injury complained of in the declaration was done. The court below gave judgment for the defendant, and the plaintiff appealed to this court.

The cause was argued before BUCHANAN, EARLE and JOHNSON, J.

Raymond, for the appellant, cited *Com. Dig. tit. Action on the Case*, (A.) *White vs. Wagner*, in this court, June term 1818. *Poultney vs. Holmes*, 1 *Strange*, 405. *Caghill vs. Freelove*, 3 *Mod.* 325. *Walker's case*, 3 *Co.* 24. 1 *Saund.* 241. *West vs. Freude*, *Cro. Car.* 187. *Winn vs. White*, 2 *Blk. Rep.* 840. *Green vs. Cole*, 3 *Saund.* 252. 1 *Bac. Ab.* 72; & 2 *Campb.* 11.

R. Johnson, for the appellee, referred to *Bac. Ab. tit. Waste*, (G.) 263. 1 *Chit. Plead.* 142. *Goodright vs. Peters*, 8 *East.* 190. 2 *Chit. Pl.* 344, (n. 2.) 2 *Saund.* 252, (n. 7.) 3 *Saund.* 252. 2 *Bla. Rep.* 1111. 1 *Taunt.* 183. 4 *Taunt.* 764. 1 *Saund.* 323. b. (n. 7.) *Bac. Ab. tit. Waste*, (J.) 271, 273. 2 *Blk. Com.* 178.

BUCHANAN, J. delivered the opinion of the court.

This is an appeal from the judgment of *Baltimore* county court on a case stated, in an action on the case, in nature of waste. [He here stated the evidence.] It is well settled that an action on the case, in nature of waste, may be brought, as well by him in remainder, for life or years, as in fee or in tail. But it has never been held to lie for one who has no interest either in remainder or reversion—the recovery being as for an injury done to the reversion. On no other ground can the action be maintained.

In this case it cannot be pretended that the plaintiff had any estate, either in reversion or remainder. He was himself but a tenant for one year, which was disclosed to the defendant at the time the room was rented, to whom he transferred all the interest he had in the premises, and nothing remained in him to be injured.

It is too plain a case to dwell upon.

JUDGMENT AFFIRMED.

Hudson
vs
Goodwin

COURT OF APPEALS, JUNE TERM, 1820.

HUDSON vs. GOODWIN.

APPEAL from *Harford* county court. It was an action of *assumpsit* brought by the appellee, as indorsee of a promissory note, against the appellant, as maker. The declaration contained two counts, one upon the note, stating it to have been made by the appellant on the 18th of March 1813, and that he thereby, 90 days after date, promised to pay *John E. Dorsey*, or order, \$760, for value received; that *Dorsey* endorsed it to *William M. Mechen*, who endorsed it to the appellee. The other count was for money had and received. The general issue was pleaded; and at the trial the plaintiff offered in evidence the following promissory note, to wit:

If the indorser of a promissory note has a middle name, his indorsement is good tho' such name is not set out at length. A blank indorsement must be filled up before verdict, or the judgment on it will be bad.

"*Baltimore*, March 18, 1813.

"\$760.

Ninety days after date I promise to pay Mr. *Jno. E. Dorsey*, or order, seven hundred and sixty dollars, for value received. (Signed,) *Jno. Hudson.*"

And thus endorsed, "*Jno. E. Dorsey,*
W. M. Mechen,
Caleb D. Goodwin."

And gave evidence of the hand writing of *Hudson*, the drawer, and *Dorsey* and *M. Mechen*, the endorsors; and that *John Edward Dorsey*, one of the endorsors of the note, usually signs his name *John E. Dorsey*, and is usually so called; and that the said endorsement is according to the usage and custom of merchants in such cases used and approved of. The defendant objected, that the plaintiff had not set out the full and true name of *John Edward Dorsey* as an endorsor, and prayed the opinion of the court, and their direction to the jury, that the plaintiff was not en-

JUNE 1820. titled to recover in this action. The court, [*Hanson and Ward, A. J.*] refused the prayer. The defendant excepted, and the verdict and judgment being against him, he prosecuted this appeal.

Hudson
vs
Goodwin

The case was argued in this court before BUCHANAN, EARLE and JOHNSON, J. by

R. Johnson, for the appellant, and

Scott, Winder and Pinkney, for the appellee.

The counsel for the appellant relied on the case of *Ringgold vs. Tyson*, decided in this court at December term, 1810. *Chitty on Bills*, 148. *Theed vs. Lovell*, 2 *Stra.* 1103. *Lambert vs. Oakes*, 1 *Ld. Raym.* 443. *More vs. Manning*, 1 *Com. Rep.* 3111; and *Edie vs. The East India Company*, 2 *Burr.* 1227.

The appellee's counsel referred to *Chitty on Bills* 147, 8. *Wilkinson vs. Nicklin*, 2 *Dall.* 398. *Peacock vs. Rhodes*, 2 *Doug.* 636. *Newson vs. Thornton*, 6 *East*, 21. (note) and *Dugan vs. The United States*, 3 *Wheat.* 182.

The opinion of the court was delivered by

BUCHANAN, J. There is nothing in the objection, that the name of *John Edward Dorsey* is not sufficiently set out. But the endorsement on the note, on which the suit was brought, appears to be in blank; and though the plaintiff might have filled it up at any time before verdict, yet not having done so, he is not entitled to recover. There is no distinction between this and the case of *Ringgold vs. Tyson*, decided by this court at December term, 1810, and we see nothing to shake the authority of that case.

JUDGMENT REVERSED.

COURT OF APPEALS, JUNE TERM, 1820.

JUNE 1820.

BATTURS vs. SELLERS & PATTERSON.

Batturs
vs
Sellers, &c

APPEAL from *Baltimore* county court. The appellant, who was the plaintiff in the court below, on the 14th of November 1814, by his agents, *Appleton* and *Poor*, sold a bale of broad cloths at *Baltimore*, to the defendants, gave them a pattern card, containing a sample cut off from one of the pieces of cloth in the bale; and at the same time made out and delivered to them a bill of parcels. The cloths at that time were in *Philadelphia*, and were to be delivered when they should arrive; and the defendants were then to give their note at 75 days in payment. The cloths arrived on the 19th of the same month, and the defendants were called upon to take them, and to give their note. But the defendants, stating in their letters to the plaintiff's agents, that the cloths were not of so good a quality as they were sold for, refused to accept them, or to give their note, and returned the pattern card and bill of parcels, neither of which were received by the plaintiff, or his said agents. The cloths were subsequently resold by the plaintiff's agents at public auction, notice of such sale having been first given to the defendants. At the resale, the cloths brought less than the defendants contracted to give, by \$721 25, and to recover that sum this suit was instituted.

Where commission merchants sell the goods of their principal, & the purchaser accepts from them a bill of parcels stating him to be the purchaser, the bill of parcels is a sufficient memorandum of the contract, within the statute of frauds.

If the fact be that the sale is for and on account of the principal, such bill of parcels is sufficient to gratify the statute of frauds, though the name of the principal does not appear in it, and though it be made out in the names of the commission merchants.

The acceptance of such a bill of parcels is a sufficient recognition by the purchaser, of the authority of the commission merchants to sign his name

On this evidence the court below, [*Dorsey*, Ch. J. and *Ward*, A. J.] were of opinion, and so directed the jury, that the plaintiff was not entitled to recover. The plaintiff excepted, and verdict and judgment being for the defendants, he appealed to this court.

The cause was argued before *BUCHANAN*, *EARLE*, and *JOHNSON*, J.

Williams, (Assistant Attorney General,) for the appellant, contended,

1. That the resale in this case was not a rescission of the contract. *Sands vs. Taylor*, 5 *Johns. Rep.* 395. *Colvin vs. Williams*, decided in this court, June term, 1810. *Mertens vs. Adcock*, 4 *Esp. Rep.* 251.

2. That this is an executory contract, and therefore not within the statute of frauds. *Clayton vs. Andrews*, 4 *Burr.* 2101. 1 *Com. on Cont.* 92.

3. That there was such a memorandum in writing, (connecting the bill of parcels with the correspondence between

JUNE 1820. the parties,) as to be a sufficient compliance with the requisition of the statute in this particular. *Rucker vs. Com-meyer*, 1 *Esp. Rep.* 105. *Davis & Buckey vs. Harding*, in this court, June term, 1816. *Saunderson vs. Jackson*, 2 *Bos. & Pull.* 238, (& note.) *Champion vs. Plummer*, 4 *Bos. & Pull.* 252, and 5 *Esp. Rep.* 240, S. C. *Coles vs. Trecothick*, 9 *Ves.* 249. *Fowle vs. Freeman*, *Ibid* 351. *Egerton vs. Matthews*, 6 *East*, 308, (note.) *Emmerson vs. Heelis*, 2 *Taunt.* 47.

Batturs
vs
Sellers, &c

4. That there was a part, or at least a symbolical delivery of the article purchased. *Cooper vs. Elston*, 7 *T. R.* 14. *Klinitz vs. Surry*, 5 *Esp. Rep.* 267. *Hinde vs. White-house*, 7 *East*, 558.

Winder, for the appellees, cited *Rondeau vs. Wyatt*, 2 *H. Blk. Rep.* 63. 1 *Com. on Cont.* 93. 3 *Johns. Rep.* 399. *Newl. on Cont.* 171, 172, 173.

The opinion of the court was delivered by

BUCHANAN, J. The question presented for the consideration of the court is, whether there is a sufficient memorandum in writing within the meaning of the statute of frauds, to bind the defendants? Which depends on principles governing analogous cases, and that have been too long settled now to be shaken. Ever since the case of *Simon vs. Motivos*, 3 *Burrows*, 1921, the writing down the name, by the auctioneer, of the purchaser of goods sold at auction, has been deemed a sufficient gratification of the statute—the auctioneer being considered as the agent of both parties. And why is he the agent of both parties? He clearly is the agent of the seller of the goods, but that does not constitute him the agent of the buyer, nor is he to be taken as such on the ground of his being a commissioned or public officer. The true reason is, that the course and manner of proceeding at sales by auction being for the auctioneer to set down the name of the highest bidder, as the purchaser, together with the price bid opposite to the article sold, which is universally known to be the practice. The bidder, by his bid, gives authority to the auctioneer to write down his name; and thus, as to that individual transaction, constitutes him his agent. If that be the true reason, (and it is believed to be the only one,) why an auctioneer is held to be the agent

of both parties, the same principle applies with equal, if JUNE 1820.
not with greater force, to the case under consideration.

Appleton and *Poor*, as the agents and on behalf of the plaintiff, sold a bale of broad cloths to the defendants, and at the same time made out and delivered to them a bill of parcels, which is headed with the names of the purchasers and seller, as such; and the quantity, description and price of the cloths, with the terms of sale, are explicitly set out.

After having entered into a contract for the purchase of the cloths, the standing by and seeing their names written on the bill of parcels, was a tacit permission by the defendants to *Appleton* and *Poor* to write their names; and the receiving it from them, after their names were so written, was a recognition of their authority, and an affirmance of their act as agents. In the case of a sale at auction, the purchaser does no more than bid—every thing further is the work of the auctioneer. In this case the defendants did much more—they first made a contract of purchase, then stood by and saw the bill of parcels made out in their names as purchasers; and lastly, accepted it from *Appleton* and *Poor*, and took it home with them—which is surely equivalent to all that is done at an auctioneer's sale.

What is asserted in the presence of a party to a suit, and not contradicted by him, is received as evidence against him, on the ground, that his silence is an implied admission of the truth of what was said. And on the same principle the acquiescence of the defendants, in the writing of their names by *Appleton* and *Poor*, in their presence, with their acceptance of the bill of parcels, is an implied acknowledgment of the authority of *Appleton* and *Poor*, as their agents, to do so, and is equivalent to their having expressly directed *Appleton* and *Poor* to make out a bill of parcels in their names, which, it must be admitted, would have made them their agents for that purpose. If therefore it is conceded, and it is now too late to be denied, that the name of a party need not be at the bottom of the instrument, but that it is enough if it is written in any part of it, there is in this case a sufficient signing by the defendants to gratify the statute. We put the pattern card out of the case; it was given to the defendants before the sale, only to enable them to judge of the quality of the respective pieces of cloth. The samples it contained were not to be taken into the estimate, either of

Batters
vs
Sellers, &c

JUNE 1820
 {
 Morris
 vs
 Wills
 the quantity or price of the cloths, and were neither delivered as parcels of the thing sold, nor intended as a symbolical delivery.

The bill of parcels is not to be considered as the contract itself; but in the view which has been taken of the subject, is a sufficient memorandum in writing, of the contract within the meaning of the statute of frauds, to bind the defendants. Not on the principle that a commission merchant, as such, is to be considered as the agent of both parties, but only under the particular circumstances of this case.

The statute of frauds, therefore, being gratified, the sale by *Appleton* and *Poor*, as the agents and on behalf of the plaintiff, must be considered as a sale by him; and the circumstance that the bill of parcels was made out in their names is no objection to his recovery.

JUDGMENT REVERSED, AND PROCEEDENDO AWARDED.

COURT OF APPEALS, JUNE TERM, 1820.

MORRIS vs. WILLS.

A, is indebted on a promissory note which he is unable to pay; B & C being equally indebted to A, agree to take up A's note, by giving their own, and that each of them should pay one half of the note so given when it became due. Under this agreement, B, draws a note in favour of C, who endorses it, and with this note A's is taken up. If, when it becomes due, B, the maker, pays the whole amount of it, he may recover one half from C in an action of general *indebitatus assumpsit*, it not being necessary to declare on the special agreement between them

APPEAL from *Charles* county court. This was an action of *assumpsit*. The declaration contained two counts, one for money paid, laid out and expended, by the plaintiff below, (the appellee,) for the defendant, (the appellant,) and the other for money lent and advanced. The facts are fully stated in the court's opinion. The court below, [*Johnson*, Ch. J.] instructed the jury, that the plaintiff was entitled to recover. The defendant excepted; and the verdict and judgment being against him, he prosecuted this appeal.

The cause was argued before BUCHANAN, EARLE, and DORSEY, J.

Magruder and *Chapman*, for the appellant, cited 1 *Esp. Dig.* 249.

Winder and *Stone*, for the appellee, cited *Exall vs. Partridge*, 8 *T. R.* 310. 1 *Selwyn's N. P.* 65. *Tousaint vs. Martinnant*, 2 *T. R.* 104; and *Morgan vs. Reintzell*, 7 *Cranch*, 273.

EARLE, J. delivered the opinion of the court. *John B. JUNE 1820.*

Wills and *William Morriss*, the plaintiff and defendant in this cause in the court below, were indorsers of a promissory note of \$1000, in *The Farmers Bank of Maryland*, drawn by *John B. Turner*, who became unable to take it up. Being, by a prior understanding between them, equally liable for *Turner*, they determined to retire this note by giving their own; and according to this resolution their negotiation with the bank took place on the 6th of November, 1816. On that day *Wills* signed a note of \$1000 to *Morriss*, or order, for value received, payable sixty days after date, and negotiable at *The Farmers Bank of Maryland*, which note *Morriss* endorsed to the bank. This arrangement had the express assent of the parties; and they further agreed, that notwithstanding the form of it, each should be equally responsible, and when the money became due each should pay one half of it to the bank. The note was protested for nonpayment, and *Wills* paid the whole of it to the bank, principal, interest, and cost of protest. This action is brought to recover back one half the money thus paid; and the question is, can *indebitatus assumpsit* for money paid be maintained for it, without a special count setting forth the particular circumstances of the transaction?

Morriss
vs
Wills

This is not the case mentioned in the argument of a special contract between two persons, where the terms of the agreement had been performed on the plaintiff's part, and a recovery consequently had on the common *indebitatus* count only. *Wills* performed his part of the agreement when he paid a moiety of the debt to the bank, and for this he can claim no remuneration. But when he paid the other moiety also, he did what *Morriss* was bound, by the understanding between them, to perform, and thence his demand against him. It is the case then of two persons making themselves severally liable for a debt, on a common consideration, to a third person, where one has been compelled to pay the whole. He may support *indebitatus assumpsit* for one half the debt paid, and need not prove the defendant's request to pay, although he is bound to state it in his pleadings. A request is implied, and necessarily arises out of the circumstances of the transaction, where one is obliged to discharge a portion of a debt another is bound to pay.

JUNE 1820. In the opinion of the court, a count on a special agreement was not necessary in this case.

Road Company
vs
Creeger

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1820.

THE HAGER'S-TOWN TURNPIKE ROAD COMPANY VS. CREEGER.

By the act of 1813, ch. 138, a supplement to the act of incorporation of the appellants, the form prescribed for taking subscriptions was, that the subscribers should sign this agreement: "We whose names are hereunto subscribed, do promise to pay to The President, Managers and Company of the Hager's Town Turnpike Road Company, the sum of — dollars for every share of stock in the said company set opposite to our respective names." The form used omitted the word "President;" and it was held to be sufficient and binding on the subscribers.

Less strictness is observed in contracts with or by corporations than in actions by or against them.

In contracts with a corporation it is sufficient that its name be so given as to distinguish it from other corporations.

Where notice is directed to be given of the time and place for receiving subscriptions for stock, the object is to prevent a monopoly of the stock, and the want of the notice is no defence to one who does subscribe.

Where a corporation has gone into operation, & rights have been acquired under it, every presumption should be made in favour of its legal existence.

APPEAL from *Frederick* county court, from a judgment rendered in that court in favour of the defendant, (the appellee,) in an action of *assumpsit* for money had and received, brought in the names of *The President, Managers and Company, of the Hager's-Town Turnpike Road Company*. The general issue was pleaded.

1. At the trial, the plaintiffs read in evidence the acts of assembly of 1809, ch. 96, 1812, ch. 50, and 1813, ch. 138. The first of these acts grants the charter to the plaintiffs; the second revives the first, which had not been carried into execution; and under the second the stock was taken. The third act confirms certain proceedings of the company, and gives the right to recover the amount of stock subscribed, in an action for money had and received. The plaintiff also offered in evidence the original subscription book, and proved the hand-writing of the defendant, as a subscriber in that book for 25 shares. The book was opened at *Mechanic's-Town* by four of the commissioners appointed by the law of 1812, ch. 50. The act of 1809 directs the commissioners to provide the books, and to enter in them a heading to the subscription, by which the subscribers "promise to pay to *The President, Managers and Company, of the Hager's-Town Turnpike Road Company*," &c. By the heading inserted by the commissioners in the book produced, the form was, that they "promise to pay to *The Managers and Company of the Hager's-Town Turnpike Road Company*," &c. leaving out the word "*President*." The act of 1809 also requires the commissioners to give notice of the time and place of opening the books, by advertisements inserted a certain length of time in particular newspapers. Upon the prayer of the defendant, the court, [*Buchanan*, Ch. J. and *T. Buchanan*, A. J.] were of opinion, and so directed the jury, that the plaintiffs were not entitled to recover; because the subscrip-

tions for stock were not taken pursuant to the form prescribed by the act of 1809, *ch. 96*; and because no evidence was offered that the persons appointed to take subscriptions gave notice in the *Baltimore, Frederick-Town* and *Hager's-Town* newspapers, of the times when, and places where, books would be opened to receive subscriptions, as directed by the said act of 1809. The plaintiffs excepted.

JUNE 1820.
Road Company
vs
Creeger

2. The plaintiffs then prayed the court to direct the jury, that if they believed the testimony, they might presume that the commissioners named in the law of 1812, did duly and regularly give notice of the time and place of opening the books for taking subscriptions for the stock mentioned in that law, as thereby directed. The court refused to give this direction, and the plaintiffs excepted. The verdict and judgment being against them, they prosecuted this appeal.

The case was argued in this court before EARLE, JOHNSON, and DORSEY, J.

Taney, for the appellants, cited *Gilb. Com. Pl. 234. The Mayor, &c. vs. Davenport, 1 Wils. 184. Mayor, &c. vs. Bolton, 1 Bos. & Pull. 40.*

Pigman, for the appellee, cited *Knight vs. the Mayor, &c. 1 Ld. Raym. 80, 81.*

EARLE, J. delivered the opinion of the court. This is an action of *assumpsit* for money had and received, founded on the act of 1813, *ch. 138*. It is brought by the turnpike company against a delinquent stockholder, to enforce the payment of money subscribed by him for shares of stock in the books opened by the commissioners at *Mechanic's-town*. Besides the several acts of assembly on this subject, the plaintiffs read in evidence, to support their case, the original subscription book opened at *Mechanic's-town*, and proved the hand-writing therein of the defendant, who subscribed for twenty-five shares. The book thus produced did not exactly conform to the *formula* prescribed by the act of assembly. The form according to the act is—"we whose names are hereunto subscribed, do promise to pay to *The President, Managers and Company, of the Hager's-Town turnpike road company*, the sum of — dollars for every share of stock in the said company, set opposite to our respective names," and the form in-

JUNE 1820

Road Company
vs
Creeger

serted by the commissioners in the books was, "we whose names are hereunto subscribed, do promise to pay to *The Managers and Company of the Hager's-Town turnpike road company*," &c. omitting the word "*President*." On this omission, and the plaintiffs' neglect to produce testimony of the notice published by the commissioners previous to opening the books, the defendant rested his defence in the action, and the court below sustained both of the objections, being of opinion that the omission and neglect were fatal to the plaintiffs' suit.

A distinction is to be found in all the authorities between actions by corporations, and contracts, leases, bonds and grants, made by or to them. In regard to the first, great strictness is observed, whereas, much indulgence is shown to support the latter; and the reason assigned is, that in actions, the consequences of a misnomer are easily repaired, while a mistake in the name, in grants, &c. would be fatal, and the benefit of them would be wholly lost. With this distinction in view, the court think that this rule may be laid down as to mistakes made in the name of corporations, that if there is enough said in their contracts, leases, bonds and grants, to show that there is such a body politic, and to distinguish it from others, the corporation is well named. In the case before us, the word "*President*" is alone omitted in the *formula*, and the court is of opinion, enough is in the other expressions to describe the corporation intended, and to effectuate the contract. And we are the more inclined to this opinion, in this case, because the contract here was not made by the turnpike company itself, or by its agents, but was made by anticipation before the company had a legal existence, and by commissioners wholly independent of, and uncontrolled by them. On this point then, we must differ in opinion with the court below. And on the other point in the *first* bill of exceptions, we can by no means agree with them. It was not necessary, to maintain the suit, to prove that the commissioners at *Mechanic's-town* proceeded regularly as to notice previous to their opening the books. This precaution is directed by law to prevent a monopoly of the stock by a few, and it does not lay with one of the monopolizers, (if this were the fact,) to take advantage of a neglect that operated in his favour. Whoever may be prejudiced by such an oversight in the com-

missioners, it is not the man who is present at the opening of the books, and takes a portion of the stock by signing his name.

House
vs.
House

After so much has been said with regard to the proof of notice, little is necessary to be added on the opinion of the court given in the *second* bill of exceptions. The court here refused to instruct the jury, that they might presume that the notice was given according to the directions of the law; and in this we think they clearly committed an error. Where a corporation has gone into operation, and rights have been acquired under it, every presumption should be made in favour of the legality of its existence.

This court, therefore, dissent from the opinions expressed by the court below in both of the bills of exceptions.

DORSEY, J. dissented. He concurred in the opinion expressed by the court below in the *first* bill of exceptions, but dissented from that expressed in the *second* bill of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

COURT OF APPEALS, JUNE TERM, 1820.

HOUSE vs. HOUSE.

APPEAL from *Frederick* county court. This was an action of *slander*. The declaration contained three counts, to which the general issue was pleaded.

The only question in the case was, whether the defendant's having charged the plaintiff *with burning his*, the defendant's, *barn*, was, *per se*, actionable. These were the words laid in the declaration, and laid without a *colloquium*. The verdict and judgment were against the defendant, and he appealed to this court.

The case was argued before EARLE, JOHNSON and DORSEY, J.

Taney, for the appellant, relied on the act of 1809, *ch.* 138, s. 5. *The United States vs. Sheldon*, 2 *Wheaton*, 119. 1 *Chitty's Plead*, 381, 382. *Barnham's Case*, 4 *Coke*, 20. *Rex. vs. Horne*, 2 *Cowp.* 684. *Holt vs. Scholefield*, 6 *T. R.* 694. *Hawkes vs. Hawkey*, 8 *East*, 431. *Onslow vs. Horne*, 3 *Wils.* 186.

Pinkney and *R. Johnson*, also relied on the act of 1809, *ch.* 138, s. 5. *Oldham vs. Peake*, 2 *W. Blk. Rep.* 959,

The act of 1809, *ch.* 138, s. 5, punishes the burning of a barn, whether it contains the articles of personal property mentioned in that section, or other articles.

The word *empty*, mentioned in that section, is used only to distinguish a barn, having the articles therein enumerated, from one that has not, and was not intended to mean a barn *entirely empty*. Every barn not containing said enumerated articles is in the meaning of said section an *empty barn*.

To charge another with burning a barn is *per se* actionable.

Though penal laws are not to be extended by construction they are to receive a rational interpretation.

JUNE 1820. 962. *S. C. Cowp.* 276. *Woolnoth vs. Meadows*, 5 *East*,
 463. *Roberts vs. Camden*, 9 *East*, 94.

House
 vs
 House

DORSEY, J. delivered the opinion of the court. The counsel for the appellant has argued with much ingenuity, that the words laid in the declaration do not *per se* import an offence, for which the plaintiff could be prosecuted and punished, and therefore are not actionable, as no *colloquium* is stated in either count. His argument is this, that the act concerning crimes and punishments, passed in the year 1809, *ch.* 138, *s.* 5, declares it to be a felony to burn a barn that is empty, or having in it personal property; and inasmuch as a barn may have in it other things than personal property, as *animals feræ naturæ*, such a barn cannot be considered as empty; neither can it be considered as having personal property within it, and of course it is not an offence within the view of the act of assembly to burn such a barn; and therefore, to charge a man with burning a barn generally, is not actionable, because, by possibility, there may have been within it *animals feræ naturæ*, or human beings, and a barn in such a condition is not empty, neither does it contain personal property. The *sixth* section of the act declares, "that every person who shall be duly convicted of the crime of wilfully burning a mill, distillery, manufactory, barn, meat-house, tobacco-house, stable, ware-house or other house, being empty, or having therein any tobacco, wheat, rye, oats, indian corn, barley, flax, hemp, hay, or other country produce, horse or horses, cattle, goods, wares and merchandize, shall suffer death by hanging by the neck, or be sentenced to undergo a confinement in the penitentiary house for a term of time not less than three or more than twelve years." As the law inflicts the same punishment for burning an empty barn, as a barn containing any kind of personal property, it is difficult to conceive why the legislature have introduced such a laboured enumeration of articles. If they had used the expression "any barn," every object would have been answered. It is impossible to believe that the legislature did not intend to punish the burning of every barn, whatever its condition might be, when they were denouncing the severest penalties, even unto death, against those who should burn a barn either empty or having personal property in it. Can it be supposed that they meant

to exempt from punishment those, who by a conflagration should involve the building and the persons within it, in one common ruin? Or are we to suppose that they considered noxious animals, as *hostes humani generis*, and that therefore, both they, and their retreat, if it happened to be a barn, might with impunity be consumed by fire? The word "empty" must be considered as relative, and used in contradistinction to enumerated articles; and therefore, every barn within the view of the law must be considered as empty, that does not contain personal property. The legislature never intended to use the word "empty" in its strictest sense; because, under no circumstances could a barn, strictly speaking, be said to be empty. While we admit the principle, that penal laws are not to be extended by construction, we hold ourselves bound to give them a rational interpretation.

Beall
vs
Bayard

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1820.

BEALL'S Lessee *vs.* BAYARD.

APPEAL from *Washington* county court. Ejectment for a tract of land called *The Brothers*, otherwise called *The Resurvey on the Brothers*, lying in *Allegany* county, contiguous to the town of *Cumberland*, containing 943 acres.

The defendant in the court below, (the appellee,) took defence on warrant, and plots were returned; and on suggestion, and an affidavit that a fair and impartial trial could not be had in *Allegany* county court, the case was transmitted to *Washington* county court for trial. At the trial there, the plaintiff, (the appellant,) read in evidence the plots and explanations, and proved that the locations on his part were truly made. The defendant also read in evidence the plots and explanations, and proved that the locations on his part were truly made. The plaintiff then read in evidence a patent for the tract of land called *The Brothers*, being the tract named in the declaration, granted on the 29th of November 1774, to *Thomas French*, on a certificate of survey dated the 11th of May 1774, under a special warrant of proclamation issued to him on the 16th of June 1763, to affect *The Resurvey on Walnut Bottom*, surveyed for *George Mason*, &c. He further gave in evi-

Where the whole of a tract of land is located on the plots, a deed, conveying the whole, may be given in evidence though it is not itself located.

If a deed conveys less than the entire tract, it cannot be given in evidence without being located, notwithstanding the location of the entire tract.

A deed reciting that the grantor was seized in fee of a tract called *The Brothers*, lying in *Allegany* county, which was granted by the Proprietor of Maryland to T. F. and by T. F. conveyed to C. and by C. to the grantor, and that the grantor had bargained and contracted with the grantee for the sale of the said tract of land, as shall not have been affected by elder surveys, and then professing for \$3000, decreed to the grantor by the chancellor, to convey to the grantee "the said tract, as corrected by a survey made by a decree of the chancellor, the metes, bounds, courses and distances being then established; to have and to hold the said tract thereby granted to the grantee and his heirs," &c. Held, that such deed conveyed only the quantity of land included within the metes and bounds, courses and distances, established by the chancellor, and cannot be given in evidence unless located.

JUNE 1820.

Beall
vs
Bayard

dence a deed from *James Clark* to *Abraham Faw*, for the same land, dated the 7th of November 1785, which recited that said land had been conveyed to *Clark*, by *Thomas French*, on the 23d of October 1779, as per his deed will appear; and then offered to read in evidence a deed from *Faw* to *Thomas Beall*, the lessor of the plaintiff, alleged by the plaintiff to embrace the same land, and dated the 24th of September 1810. It recited, "that *Faw* was seized in his demesne, in fee simple, of and in a tract of land situate, lying and being, in *Allegany* county, contiguous and adjacent to the town of *Cumberland*, called *The Brothers*, or *The Resurvey on the Brothers*, originally estimated to contain 943 acres of land, which said tract of land was conveyed to *Faw*, by *Clark*, by deed dated the 7th of November 1785, and which tract of land was conveyed to *Clark*, by *French*, by deed dated the 23d of October 1779, and which said tract of land was granted to *French* by the then Proprietor of *Maryland*, by virtue of a proclamation warrant, as by his patent, issued on the 29th of November 1774, would more fully appear." It also recited, that *Faw* had bargained and contracted with *Beall* for the sale of the said tract as had not been affected by older surveys, and then professes, for and in consideration of \$5000, which had been decreed to *Faw* by the chancellor, to convey to *Beall* "the said tract, as corrected by a survey made by a decree of the honourable the chancellor of *Maryland*, the metes, bounds, courses and distances, being then established; to have and to hold the said tract, thereby granted, unto *Beall*, and his heirs, &c.

To the reading of this deed the defendant, by his counsel, objected, because it was not for all the land included within the lines of *The Brothers*, and because it was not located on the plots. The court, [*Buchanan*, Ch. J. *Shriver* and *T. Buchanan*, A. J.] sustained the objection, on the ground that the deed was not located on the plots, and therefore refused to let it go to the jury. The plaintiff excepted, and the verdict and judgment being against him, he appealed to this court.

The cause was argued in this court before *EARLE*, *JOHNSON* and *DORSEY*, J. by

Taney, for the appellant. He cited *Hall's Lessee vs. Gough*, 1 *Harr. & Johns*. 119.

No counsel appeared for the appellee.

DORSEY, J. delivered the opinion of the court. The JUNE 1820. point raised in argument by the appellant's counsel is this — Was the deed from *Abraham Faw* to *Thomas Beall*, of *Samuel*, for the tract of land called *The Brothers*, located on the plots? And this depends upon the question, whether the deed does in legal operation convey the whole tract; because, if it does, the deed, in effect, was located as the patent of the tract appears to have been located. The deed, after reciting that *Abraham Faw* was seized in fee simple of the tract of land called *The Brothers*, lying in *Allegany* county, which was granted by the then Proprietor of *Maryland* to *Thomas French*; and that the said *Faw* had bargained and contracted with the said *Beall* for the sale of the said tract as shall not have been affected by older surveys, professes, for and in consideration of the sum of \$5000, which had been decreed to him by the chancellor of *Maryland*, to convey unto the said *Beall*, “the said tract as corrected by a survey made by a decree of the honourable the chancellor of *Maryland*, the metes, bounds, courses and distances, being then established; to have and to hold the said tract, thereby granted, unto the said *Beall* and his heirs.” It is obvious, from reading this deed, that the grantor only intended to convey so much of the tract as was within the metes, bounds, courses and distances, established by the chancellor; and the consideration money which he received from *Beall*, was co-extensive with this intention. The recital in the deed most clearly evinces this intention, and the granting part expressly declares it, by stating that the chancellor had corrected and established the metes, bounds, courses and distances, of the tract. The decree of the chancellor is referred to by each party, as establishing the extent of the land intended to be conveyed, and they must be bound by it; and the words of the *habendum* is perfectly consistent with this construction, as it uses the terms “the said tract of land hereby granted.” If the deed in question had contained a general warranty, and *Beall* had been evicted, it would hardly be contended, that *Faw* could be made to respond in damages for the loss of that part of the tract which did not lie within the metes, bounds, courses and distances, as established by the chancellor; but such would necessarily be the result, if the deed operated to convey the whole of the tract as patented.

Beall
vs
Bayard

JUNE 1820.

Shivers
vs.
Wilson

The court are of opinion, that the court below did not err in not permitting the deed to be read in evidence to the jury, as the same was not located on the plots; and therefore

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1820.

SHIVERS vs. WILSON, Garnishee of WALKER, et al.

In a court of general jurisdiction, the personal disability of the plaintiff to sue, can only be taken advantage of by a plea in abatement.

Where a court has general jurisdiction, but its proceedings in relation to any particular subject are specially pointed out by statute, the mode so prescribed must be substantially pursued.

A court of limited jurisdiction must shew its jurisdiction on the face of its proceedings.

The act of 1795, ch. 56, regulating the manner of issuing attachments, is limited in its operation, and nothing done under it is valid, unless its provisions are substantially complied with.

No one can issue an attachment under that act but a citizen of this state, or of some other state of the United States. One may be a citizen of the United States, and not a citizen of any one state of the United States—an allegation, therefore, that the party suing out an attachment is a citizen of the United States, is not sufficient; it must appear by the proceedings that he is a citizen of this state, or of some other state of the United States.

The proceedings under the act of 1795, ch. 56, must not only shew that the party suing out the attachment is a citizen of this state, or of some other of the United States, but when the garnishee appears, and pleads *non assumpsit* by the defendant, the plaintiff must at the trial, prove himself to have been, at the time of the issuing out the attachment, a citizen of this state, or of some other of the United States.

APPEAL from Baltimore county court. The plaintiff in the court below, (the present appellant,) in order to obtain an attachment under the act of 1795, ch. 56, exhibited to the clerk of that court the following affidavit, to wit: "State of Maryland, Baltimore county, sct. Be it remembered, that on the 27th day of April, in the year 1816, before me, the subscriber, a justice of the peace for Baltimore county aforesaid, personally appeared *Thomas Shivers*, a citizen of the United States, and made oath that *William Walker*, *James Collins* and *Jared Chesnut*, not being citizens of the State of Maryland, and not residing therein, are justly and *bona fide* indebted unto him, the said *Thomas Shivers*, in the sum of \$3257, over and above all discounts. And at the same time the said *Thomas Shivers* produced to me the protested bill of exchange and award, on and by which the said *William Walker*, *James Collins* and *Jared Chesnut*, are so indebted, which are hereto annexed. And the said *Thomas Shivers* did also make oath that he is credibly informed, and verily believes, that the said *William Walker*, *James Collins* and *Jared Chesnut*, are not, nor is either of them, a citizen of the State of Maryland, and that they do not, nor does either of them, reside therein.

Sworn before,

John F. Harris."

The bill of exchange, protest and award, referred to, were annexed to the affidavit. There was also a warrant from the said justice, directed to the clerk of the county court, requiring him to issue an attachment against the lands, &c. of the said *Walker* and others. Upon this warrant, &c. an attachment issued, directed to the sheriff

of the county, reciting, that "whereas *John F. Harris, Es.* JUNE 1820.
 quire, one of the justices of the peace for *Baltimore* county,
 hath this day issued his warrant to the clerk of said coun-
 ty, directing him to issue an attachment against the lands,
 tenements, goods, chattels and credits, of *William Walk-*
er, James Collins and *Jared Chesnut*, to answer unto *Tho-*
mas Shivers the sum of three thousand two hundred and
 fifty-seven dollars;" the sheriff was therefore command-
 ed to attach the lands, &c. of the said *Walker* and others,
 &c. in the usual form of the mandatory part of such writs.
A capias ad respondendum also issued, and a copy of the
 short note, which was filed, was sent with the writ. The
 sheriff's return on the writ of attachment was, that he had
 laid the same in the hands of *Nixon Wilson*. The *capias*
ad respondendum, he returned *non sunt*, and that he had
 set up a copy of the short note. *Wilson*, the garnishee,
 appeared, and pleaded *non assumpsit* by *Walker* and others,
 and *nulla bona*. Issue was taken on the first plea, and a
 general replication and issue was joined on the other.

At the trial, the plaintiff produced evidence to prove,
 that a bill of exchange dated at *St. Jago de Cuba*, the 1st
 of August 1815, for \$2912, at 60 days after sight, was
 drawn by *H. Geddes* and *T. F. Pimm*, in favour of the
 plaintiff, on *Walker* and others, and by them duly accept-
 ed. He further gave evidence, that payment of the bill was
 regularly demanded of the defendants, when it became due,
 and refused, and that the bill was then regularly protested
 for nonpayment. He further offered evidence to prove,
 that the garnishee in this case had funds belonging to *Walk-*
er and others, in his hands, to the amount of \$2600, at the
 time the attachment was laid. The defendant then moved
 the court to direct the jury, that the citizenship of the plain-
 tiff was not sufficiently set forth in the attachment, within
 the meaning of the act of assembly of 1795, *ch. 56, s. 1*;
 and that the plaintiff was not entitled to recover without
 he gave evidence to the jury to satisfy them that he was a
 citizen of this state, or some other of the *United States*.
 The court below, [*Dorsey, Ch. J. Hanson* and *Ward, A.*
J.] gave the direction as prayed. The plaintiff excepted;
 and the verdicts and judgment being against him, he pro-
 secuted this appeal.

The cause was argued at the last term before *BUCHAN-*
AN, EARLE and *JOHNSON, J.*

Shivers
vs
Wilson

JUNE 1820, *Winder*, for the appellant, cited *Campbell vs. Morris*, 3 Harr. & M'Hen. 535. *Smith vs. Greenleaf*, 4 Harr. & M'Hen. 291; and *Smith et al. vs. Gilmor & Sons*, in this court, Dec. term 1812, and June term 1816.

Shivers
vs
Wilson

Pinkney and *R. Johnson*, for the appellee, relied on *Hepburn & Dundas vs. Ellzey*, 2 Cranch, 445. *The Corporation of New Orleans vs. Winter, et al.* 1 Wheat. 91. *Campbell vs. Morris*, 3 Harr. & M'Hen. 553. 3 Blk. Com. 302. *The King vs. Johnson*, 6 East, 586, 594. 5 Bac. Ab. tit. Pleas & Pleadings, (E.) 661. *Mostyn vs. Fabrigas*, Cowp. 166, 172. 1 Chitty's Plead. 426, (note b.) *Bingham vs. Cabot*, 3 Dall. 383. *Abercrombie vs. Dupuis*, 1 Cranch, 343. *Wood vs. Wagon*, 1 Cranch, 9. *Capron vs. Van Noorden*, Ibid 126. *Kemp's lessee vs. Kennedy, et al.* 5 Cranch, 173; and *Rex vs. Jarvis*, 1 Burr. 148.

Curia adv. vult.

JOHNSON, J. at this term, delivered the opinion of the court. In this case it has been determined by Baltimore County court, that on the plea of *non assumpsit* by a garnishee, it was incumbent on the plaintiff, before he could recover, to produce evidence to the jury, that he was a citizen of his state, or of some other of the United States. No such proof was exhibited, and the garnishee sustained his defence.

On the part of the appellant it is contended, that, as the court before whom the cause was depending had a general, and not a limited jurisdiction, over the matter in contest, no advantage could be taken of the plaintiff's incapacity to sue, except by a plea in abatement.

No position in law is more clearly established, than that a defendant in a cause, before a court of general jurisdiction, must, if he wishes to avail himself of the disability of the plaintiff to sue, do so by a plea in abatement; and no principle of law is more evident, than that where the tribunal is of a limited jurisdiction, or the proceedings are particularly described by a statute made on the subject, that course of procedure, so described, must, on the face of the record, appear to have been, if not literally, at least substantially complied with, or the case must by the proceedings disclose itself to be within the limited jurisdic-

tion. It follows, from the preceding principles, that the JUNE 1820. decision of the court below must be sustained, if it had but a limited jurisdiction, or if its course of proceeding was of a circumscribed description, unless, on the face of the record, the case shall appear to have been within the jurisdiction, or the course of proceeding directed by law, to have been substantially complied with.

Shivers
vs
Wilson

On these principles rest the numerous decisions on the acts for marking and bounding lands, made by the late general court, and all the courts of the state of original jurisdiction, and which have been universally acquiesced in. In these cases, notwithstanding the statutes explicitly declare that unless the adjudication under them is called in question within a *prescribed period*, it shall be *final and conclusive*; yet, in every instance, where attempts have been made to use those proceedings on the trial in ejectments, where the land comprehended in the commissions has been the subject in contest, they have been rejected, (although no exception had been taken to them within the limited time,) unless the whole proceedings appeared to have pursued the course prescribed by such statutes. The power of the county courts, under these acts, was universal; they, and they alone, were authorised to issue those commissions; they, and they only, had the authority to direct the adjudication of the commissioners to be recorded; and when recorded, the act of assembly itself, after the expiration of the time mentioned, declared them final; yet invariably have the courts determined them not to be final, but, on the contrary, of no effect whatever, unless they were on their face entirely regular. These decisions rest on the principle, that where the course of procedure is described by the statute, the proceedings themselves must show their conformity with the act by which they are authorised, and that otherwise advantage of non-conformity can, at any time, be taken.

The act of 1795, *ch.* 56, under which the proceedings in this case are supposed to be protected, gives, it is true, full and entire jurisdiction in all cases of attachments coming within the purview of the act, yet that entire jurisdiction is confined to such cases as the act embraces. If the act comprehends the case at bar, then no exception to the disability of the plaintiff was available, except by plea in *abatement*; if, on the contrary, that act extends

JUNE 1820. not to the case, the plaintiff had no right to recover, and the decision against him was correct. The act of assembly needs only to be read to discover its *limited* operation. It gives not the right to *every person* to issue, or cause attachments to issue; its provisions confine the remedy to *citizens of this state*, or to some *other of the United States*, and the manner in which they are to proceed is, in detail, pointed out. The plaintiff, to succeed under that law, must come within its provisions; the plaintiff, to recover under that act, must follow its directions. The record before the court, in this case, in no part of it brings the plaintiff within that description of persons who had a right to issue, or cause the attachment to have been issued. The right to condemn the property in favour of such a plaintiff, is by no law vested in the court before whom the cause was tried, or in any other court.

Sbivers
vs
Wilson

If the question was now to be taken up, uninfluenced by any adjudication, it must be a forced construction that could bring a person, as described by these proceedings, within its pale; that could extend relief to him, who at the trial of the cause refused, or failed to prove himself within the description of the law. But the matter is not for the first time before the court. The effect of such language, as the act contains, has been ascertained by the decisions on the constitution of the *United States*. And although this court are not bound by those decisions, yet, having been pronounced by one of the most enlightened tribunals in *America*, it would be unbecoming in this court to declare them to have been erroneous; and if not erroneous (as we are of opinion they are not) it follows that the opinion of the court below, made in conformity with the principle established by those decisions, was correct, and the judgment given ought to be affirmed.

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1820.

JUNE 1820.

FOUKE *et al.* vs. KEMP'S Lessee.Fouke
vs
Kemp

APPEAL from *Washington* county court. Ejectment for four tracts of land, viz. *Bachelor's Delight*, *Felty's Fortune*, *Felty's Addition*, and *Addition to Dearbought*. The defendants in the court below, (the now appellants,) took defence on warrant for the three first tracts only, and plots were returned. For the last tract, judgment was entered by default against the casual ejector.

1. At the trial, the plaintiff below read in evidence the following patents viz. one for *Bachelor's Delight*, granted to *John Feltigrow*, on the 11th of November 1752; another for *Feltigrah's Fortune*, granted to *John Feltigrah* on the 18th of June 1742; and one for *Felte's Addition* granted to *Felte Graw* on the 25th of May 1743. He also gave in evidence, that the patentee in the several patents named, was one and the same person, though called by different names, and that *John Feltigraw* was that patentee. That the patentee died in the year 1760, seised in fee simple of the above mentioned tracts of land, and leaving two daughters *Barbara* and *Mary*, his only children, and heirs at law, and a widow, who survived him about two years. That *Barbara* married *Ludowick Kemp*, before the year 1767, by whom she had issue several children, and that she died in 1784, leaving *Henry Kemp*, the lessor of the plaintiff, her eldest son and heir at law. That *Ludowick Kemp* survived her, and died in the year 1813. That *Mary*, the other daughter of *John Feltigraw*, married *John Wolgamot*, by whom she had issue several children. That *Wolgamot* died in the year 1779, and his wife *Mary* survived him, and afterwards died in the year 1814, leaving a will legally executed; and which the plaintiff read in evidence, dated the 18th of July 1808, which contains, among other devises, the following: "I give, devise and bequeath, unto my son *John Wolgamot*, all my real and personal estate which I may die seised or possessed of, in *Washington* county, or elsewhere, to him the said *John Wolgamot*, his heirs and assigns for ever, he paying the following legacies hereafter mentioned to wit," &c. The plaintiff further read in evidence a deed from *John Wolgamot*, the devisee in the said will mentioned, to *Henry Kemp*, the lessor of the plaintiff, dated the 20th of December 1816, for all the

A devise to the testator's children where he has children of his own, and step-children, does not embrace the step-children; and parol evidence is inadmissible to prove that the testator intended to include them

Has the introductory clause in a will, and the charging the estate devised with the payment of debts, the effect to enlarge the estate of the devisee? *Quere*

An ejectment may be maintained for land by its reputed name.

JUNE 1820. land within the tracts of land called *Felty's Fortune*, *Felty's*

Foulke
vs
Kemp

Addition, and the part of *Bachelor's Delight*, laying on the east side of the following division lines, to wit, &c. and proved, that all the land within the three tracts, which lies on the east side of the said six division lines, to which *John Wolgamot* has any right, &c. is the land conveyed by this deed. The deed recited, that *Feltigraw* died seised of *Felty's Fortune*, *Felty's Addition*, and part of *Bachelor's Delight*. That a resurvey was made of the said lands by *Wolgamot* and wife, and *Kemp* and wife, and called *The Amendment*, &c. The defendants then read in evidence the will of *John Feltigraw*. It is stated to be the will of *Valentine Grove*, dated the 29th of September, 1760, and after the following introductory clause, viz. "and as touching such worldly affairs wherewith it hath pleased God to bless me in this life, I give, devise, and dispose of the same, in the following manner and form, to wit," he then devised to his daughter *Mary*, 200 acres of land, and to his daughter *Barberry*, 200 acres of land, to be taken out of his tract of land where his dwelling house stands, and up to the Upper Spring. He also gave to his said daughters £60, to be paid to each of them; and gave also to each of them a feather bed, &c. and that after all was divided, and all his debts and funeral expenses were paid; those two daughters should have an equal share with all his surviving children, only giving to his wife *Elizabeth*, the third part of all his estate both real and personal, during her life, and after her decease, to be equally divided amongst all his surviving children, &c. They also proved, that *Valentine Grove*, the deviser in said will, and *John Feltigraw*, the patentee before mentioned, was the same person. They also read in evidence the following deposition, taken by consent, and read under an agreement that the same should be evidence as far as the matters therein contained were legally admissible, viz. The deposition of *Mary Kershner*, aged about 74 years, taken 24 of March, 1819—She knew *Valentine Grove* and his family; she was 15 or 16 years old when he died. He married a widow *Shafer*, who had four children by her first husband, *Nicholas*, *Peggy*, *Betsey* and *Susan*, all very small when their mother was married to *Grove*. *Susan* appeared to be about two years older than *Mary* the eldest of Mrs. *Grove's* children by her last husband. *Peggy* had married and left

the family, but the other three lived with *Grove*. *Betsey* JUNE 1829. had married and left the family before *Grove* died. Does not remember whether *Nicholas* and *Susan* had or not. *Grove* treated them as his own children. They always called him father, and he spoke to them as he did to his own children, and sometimes called *them* children, and sometimes called them by their christian names. Mrs. *Grove* was upwards of 60 years of age when her last husband died, and had but two children, *Mary* and *Barbara*, by him. That Mrs. *Grove's* children by her first husband, were known not to be the children of *Grove*, but his step-children. *Mary* and *Barbara* were called *Grove*, and the children of *Shafer* called by the name of *Shafer*. *Mary* was married to *Wolgamot*, and *Barbara* was married to *Ludwick Kemp*, who was the father of *Henry Kemp*, the lessor of the plaintiff. The plaintiff then gave in evidence, that all of the step children of *John Feltigraw*, mentioned in the foregoing deposition, died about 25 years ago, but left issue. The plaintiff then prayed the opinion of the court, and their direction to the jury, that if they believed the evidence, the plaintiff was entitled to recover all that part of *Batchelor's Delight* and *Felty's Addition*, for which the defendants had taken defence on the plots in this cause. This prayer the court, [*Shriver* and *T. Buchanan*, A. J.] granted. The defendants excepted.

Fouke
vs
Kemp

2. The plaintiff then further gave in evidence a grant for the tract of land called *The Amendment*, for the purpose of shewing that the tract of land called in the patent *Feltigraw's Fortune*, was also known by the name of *Felty's Fortune*, as it was called in the declaration in the cause. This tract, called *The Amendment*, was granted to *John Wolgamore* and *Mary* his wife, and *Ludwick Kemp* and *Barbara* his wife, on the 10th of September 1787, and recited that they were seized of and in the following tracts or parts of tracts of land, lying in *Frederick* county, and contiguous to each other, viz. 620 acres, part of the *Resurvey on Batchelor's Delight*, originally on the 11th of November 1752 granted unto *John Feltigraw* for 818½ acres; *Felty's Fortune*, originally on the 13th June 1742 granted to the said *Feltigraw* for 150 acres; *Felty's Addition*, originally on the 25th of May 1743 granted unto the said *Feltigraw* for 120 acres, &c. He also offered in evidence, the deed before mentioned, from *John Wolgamot* to *Henry*

Ejectment may
be maintained for
land by its repa-
ted name.

JUNE 1820

Fouke
vs
Kemp

Kemp, for the same purpose; and proved, by competent witnesses, that the tract called in the patent *Feltigrah's Fortune*, is generally reputed and known in the neighbourhood by the name of *Felty's Fortune*. The defendants then prayed the opinion of the court, that upon the declaration filed in this cause, and the evidence stated in the exceptions, the plaintiff was not entitled to recover any part of the land called in the patent *Feltigrah's Fortune*. The court refused to grant the prayer, and the defendants excepted. The verdict and judgment being for the plaintiff, the defendants prosecuted this appeal.

The case was argued before BUCHANAN, EARLE, JOHN-
SON, and DORSEY, J.

Ridout, for the appellants, relied on *Barker vs. Giles*, 3 P. Wms. 282. *Minshull vs. Minshull*, 2 Atk. 412. *Wylke vs. Thurlston*, Ambl. 555. *Gale vs. Bennett*, Ibid 681. 8 Vin. Abr. tit. *Devise*, (T. b.) pl. 3, 7, 21, and (X. b.) pl. 5. 2 Eq. Cu. Abr. 290, pl. 7. *Pow. on Dev.* 224. *Pyot vs. Pyot*, 1 Ves. 335. *Newcomin vs. Bak-
hum*, 2 Vern. 729. *Doe, d. Wilkey vs. Holmes*, 8 T. R. 1. *Goodtitle, d. Paddy vs. Maddern*, 4 East, 496. *Dunn, d. Moore vs. Millor*, 5 T. R. 558. 6 T. R. 175. 1 Bos. & Pull. 558. *Beachcroft vs. Beachcroft*, 2 Vern. 690. *Pre. in Chan.* 430. *Bailis vs. Gale*, 2 Ves. 48. (4 Cruise, 246.) *Throgmorton vs. Holliday*, 3 Burr. 1618. *Tanner vs. Wise*, 3 P. Wms. 295.

Tancy, for the appellee, cited 4 Bac. Ab. tit. *Legacies*, (B. 2.) 348. *Cooke vs. Brooking*, 2 Vern. 106. *Rad-cliff vs. Buckley*, 10 Ves. 195. *Godfrey vs. Davis*, 6 Ves. 43; and 4 Cruise, 319.

BUCHANAN, J. delivered the opinion of the court, affirm-
ing the judgment. He stated, that as the testator, *Groove*, had children of his own, as well as step-children, the legal construction of his devise was, that his own children only took under it, and that that construction could not be affect-
ed by parol proof.

COURT OF APPEALS, JUNE TERM, 1820.

JUNE 1820.

BARNEY vs. THE MARYLAND INSURANCE COMPANY.

Barney

Insurance Co'y

APPEAL from *Baltimore* county court. Covenant on a policy of insurance, dated the 29th of September 1809, was brought by the appellant against the appellees. The declaration contained two counts: The *first count* recited the policy of insurance, and that the plaintiff paid to the defendants the sum of \$1200, the amount of the premium for the insurance of the schooner *Hawk*, her tackle, &c. That she was an *American* vessel, regularly documented as such, and so continued till the loss, &c. That she was tight, &c. and belonged to the plaintiff; and was of the value of \$8000, and upwards. That the plaintiff had performed, &c. and that on the 29th of September 1809, said schooner was in safety at *Baltimore*, bound to *St. Sebastians*, and sailed in like safety on the voyage insured. That afterwards on the 11th of January 1810, whilst on the high seas, and in the lawful and regular prosecution of said voyage, she was captured and carried away by a number of armed men on board certain vessels to the plaintiff unknown, whereby she became totally and wholly lost to the plaintiff; of which the defendants, on the 18th of April 1810, had notice, &c. The *second count* stated, that on her said voyage from *Baltimore* to *St. Sebastians*, she was, by the danger of the seas and the violence of the wind, &c. bulged, &c. and thereby totally lost to the plaintiff, &c. *Non infregit* was pleaded, and issued joined.

Much evidence was given by the plaintiff (which it is unnecessary to state here, as it is fully set forth in the opinion of the court,) and the court below (*Bland, A. J.*) was of opinion, and so instructed the jury, that it was not sufficient to entitle the plaintiff to recover. To this opinion he excepted; and the verdict and judgment being against him, he prosecuted the present appeal. The cause was first argued in this court at June term 1817, before CHASE, Ch. J. BUCHANAN, EARLE, JOHNSON, MARTIN and DORSEY, J. by *Harper*, for the appellant, and by *Winder*, for the appellees, and continued, under a *curia advisare vult*, until this term, when, at the instance of the court, it

The words of a warranty in a policy of insurance "not to abandon, in case of capture, until condemned," are to be construed according to their ordinary sense, and must be understood to mean a capture *jure belli*, and a judicial condemnation on such capture by a prize court of competent jurisdiction.

If a policy contains the warranty at once mentioned, and the vessel insured and taken, and retained in the service of the government to which the captor belongs, without being condemned by a prize court of competent jurisdiction, the insured has no right to abandon.

The seizure and appropriation of an insured vessel by a foreign government, without the sentence of a court of competent jurisdiction, does not divest the owner (though insured,) of his right of property; and, so long as the vessel exists, he cannot recover, as for a total loss, without abandoning.

Whenever there is *spes recuperandi*, the insured must abandon to entitle himself to demand of the insurers as for a total loss.

The words in a policy "insured against all risks except seizure in port," must be understood to mean any arbitrary seizure.

Though the plaintiff declares as for a total loss, he may, if the evidence will justify it, recover as for a partial loss.

In an insurance on a vessel, no loss in port, can be re-

loss incurred by reason of wages, provisions or demurrage, during her detention in port, can be recovered.

When there is a loss by capture, the insured cannot recover as for a partial loss on a policy insuring against capture, without giving other evidence than the *spes recuperandi*—A different rule would lead to fraud and injustice on the underwriters.

JUNE 1820. was again argued before BUCHANAN, EARLE, JOHNSON and
 DORSEY, J.

Barney
 vs
 Insurance Co'y

Harper, and Williams (assistant attorney general,) for the appellant, cited *Featon vs. Fry*, 5 *Cranch*, 341. *Marsh. Ins.* 248, 249, ch. 8, s. 1. *The Starr*. 3 *Wheat.* 100 (note.) *Schooner Exchange vs. M'Faddon, and others*, 7 *Cranch*, 116, 146. *Marsh. Ins.* 479, 509, 10, 15, 16; and *Mitchell vs. Edie*, 1 *T. R.* 608.

Pinkney and Winder, for the appellees, cited *Black vs. Marine Insurance Company*, 11 *Johns. Rep.* 287. *Tucker vs. Juhel and DeLonquarmare*, 1 *Johns. Rep.* 20. *Unwin vs. Wolseley*, 1 *T. R.* 678, *Park*, 84; and *Marsh. Ins.* 248 to 251, 422, 479, 481, 495, and 509.

BUCHANAN, J. delivered the opinion of the court. The proof, as set out in the bill of exceptions, is substantially this—That on the 29th of September 1809, the schooner *Hawk*, the property of the plaintiff, was insured by *The Maryland Insurance Company*, at and from *Baltimore* to *St. Sebastians*; that she sailed on the 16th of October of the same year, and was captured on the 11th of January 1810, by certain *French* armed vessels, and carried into *Bermia*, a port in *Spain*, then in the possession of the *French* government; that she was taken from thence by the captors to *St. Sebastians*, and afterwards, on the 19th of April 1810, to *Bayonne* in *France*, and there detained by them until the 9th of January 1811, when she was ultimately taken into the service of the *French* government, by order of the minister of marine, as a public armed ship, and has never been restored. That on the 10th of October 1809, the policy of insurance was assigned by the plaintiff to *Falls* and *Brown*, of which the defendants had notice; and that on the 18th of April 1810, they addressed a letter to the defendants, advising them of the capture and detention of the vessel at *Bermia*, and offering to abandon. That on the 24th of April the defendants acknowledged the receipt of the letter of *Falls* and *Brown* of the 18th of April, but declined to accept the abandonment. That on the 13th of November 1810, *Stewart Brown*, the agent of *Falls* and *Brown*, wrote again to the defendants, informing them that the cargo had been sold at *Bayonne* on the 9th of August 1810, and the proceeds paid

over to the *French* government; that the schooner remain- JUNE 1820.
 ed in the possession of the captors, out of the control of
 the assured, and had been so from the time of the capture,
 and insisting on payment for a total loss. That on the
 6th of December 1810, he addressed another letter to
 them, alleging that the vessel had been abandoned to them
 on the 13th of November, and claiming payment for the
 loss; and that on the 12th of February 1811, he wrote a
 fourth letter to them to the same effect. The policy of in-
 surance is in the common form, with an exception of "sei-
 sure in port" from the risks insured against, and a war-
 ranty or stipulation on the part of the assured "not to
 abandon in case of capture until condemned." On this
 policy the suit was brought. The declaration has two
 counts, the *first* for a total loss by capture at sea, and the
second for a total loss by the dangers of the sea. No part
 of the testimony having any application to the *second*
 count, the case turns upon the *first*, to which the opinion
 expressed by the court below is exclusively confined.

Agency
 vs
 Insurance Co'y

There are two questions arising in the cause—1. Whether, admitting the facts as stated to be true, the plaintiff is entitled to recover as for a total loss? 2. If he is not entitled to recover as for a total loss, whether he can recover as for a partial loss? They will be considered in the order in which they are presented. The warranty or stipulation in the policy, "not to abandon in case of capture until condemned," is to be construed according to the ordinary sense of the terms used; and so understood, must be taken to mean a capture *jure belli*, and a judicial condemnation in a prize court of competent jurisdiction. The intention of the parties was, that in the event of the vessel being captured, the insurers should not be made answerable by abandonment as for a total loss, unless the capture should be followed up by a regular sentence of condemnation. By the word "condemned," connected as it is with the words "in case of capture," a condemnation on proceedings founded on the capture is intended, which could only be in a court of prize, and it cannot be strained to mean any thing else. But if any thing was necessary to explain the sense in which the terms were intended to be used, it might be found in the further stipulation by the plaintiff "to do all in his power, in case of capture, for the defence of the property, and if condemned to enter an appeal;"

JUNE 1820.

Barney
vs
Insurance Co'y

that is, to defend the property in proceedings founded on the capture, and to appeal from any judicial sentence of condemnation on those proceedings, as in no other case could there be an appeal. Here the *Hawk* was captured by *French* armed vessels, and after being a long time detained by the captors was, without any judicial proceedings being had against her, taken into the service of the *French* government by order of the minister of marine, which clearly was not a condemnation within the terms of the policy, but an arbitrary measure—an act done under some municipal regulation of *France*, not known to the law of nations. The plaintiff, therefore, had no right to abandon, and the case stands as if there had been no abandonment, or offer to abandon; which makes it unnecessary to inquire, whether the abandonment relied on was well made and in proper time or not. But it is said that the stipulation by the plaintiff, not to abandon, could not operate to prevent his recovering as for a total loss, in any case in which abandonment would not be necessary, as where nothing remained to be abandoned, and that this is such a case. That admitting the order of the minister of marine not to be a condemnation within the terms of the policy, yet that the taking the vessel into the service of the *French* government, placed her so entirely without the control of the plaintiff, as to be equivalent to a final sentence of condemnation; and that therefore it was not necessary to abandon. But there is a mistake in the supposed legal effect of the order of the minister of marine: It did not divest the plaintiff of his right of property; the vessel was not destroyed, but specifically remained, and the *spes recuperandi*, however remote and weak, was not extinguished. If, therefore, nothing else had stood in his way, the plaintiff could not have claimed as for a total loss without abandoning; for as it is settled, that the assured can never recover for any greater injury than he has sustained, he must, before he can go as for a total loss, renounce to the insurer all his right and title to whatever may be saved; leaving to him the *spes recuperandi*, that he may have the benefit of a recapture, or any other accident by which the thing may be recovered; and thus justice is done to both—to the insured, by giving him an indemnity for all the loss he has sustained; and to the insurer, by putting him in the place of the insured, in case any thing should ever be re-

covered. The insured has his election to abandon or not, JUNE 1820.
 and until he has made that election, no right can vest in
 him as for a total loss. The rule is a good one, it has its
 foundation in justice, and ought never to be shaken. Be-
 sides, the exception in the policy as to seizure in port ob-
 viously points to something not within the ordinary risks,
 the danger of which the plaintiff was willing to take upon
 himself. The words of the exception are, "insured
 against all risks except seizure in port," and must be un-
 derstood to mean any arbitrary measure not foreseen by
 the parties, but which it was apprehended might grow out
 of the then disturbed and extraordinary state of things in
Europe, and which the defendants were not willing to be-
 come answerable for. The order of the minister of ma-
 rine was an arbitrary and unforeseen measure; and the
 taking the *Hawk* into the service of the *French* government
 may be considered as an act separate and distinct from the
 capture, and as a seizure within the exception, certainly
 within the letter of it. This may be thought a hard case
 on the part of the plaintiff, but it is his contract, and the
 defendants have a right to stand upon it. The language of
 his warranty, or stipulation, call it which you will, is very
 comprehensive, and we must construe it according to the
 ordinary meaning of the terms used, and are not left to
 guess at what might possibly have been his intention; and
 when we think we have discovered it, to give it effect con-
 trary to the natural import of his words. He has under-
 taken not to abandon in any case of capture until there
 should be a judicial sentence of condemnation, and has
 thus virtually engaged, in case of capture, if any thing
 should happen to prevent a condemnation, not to turn it
 into a total loss by abandonment. There has been no such
 sentence, and to give effect to the abandonment set up, ad-
 mitting it to have been made after the vessel was taken in-
 to the service of *France*, would be to enable him to recover
 by means of a violation of his contract.

With respect to the second question; though the plaintiff
 has declared as for a total loss, there is no doubt that he
 might recover as for a partial loss, if there was any thing
 in the record to support such a claim. The insurance is
 on the vessel, and it seems to be settled, that in such case
 there can be no recovery for loss incurred on account of
 wages, provisions or demurrage, during the detention of the

Barney
 vs
 Insurance Co^y

JUNE 1820. ship; and if it was not so, there is in this case an express renunciation in the memorandum on the policy "of all claims against the company for demurrage, seamen's wages or provisions," and it does not appear that any damage was done to the vessel, tackle or furniture.

Barney
vs
Insurance Co'y

But it is contended, that the vessel being taken into the service of the *French* government, and nothing but the right of property remaining, the sum insured, after deducting the value of the *spes recuperandi*, to be ascertained by the jury, is the loss actually sustained, and the amount for which the plaintiff ought to recover. Here again we are met by the exception in the policy of seizure in port. But if it should be admitted, that the taking the vessel into the service of the government of *France*, under the order of the minister of marine, does not fall within the exception, and is to be considered as a loss by capture, yet the *spes recuperandi* cannot be resorted to as a criterion by which to ascertain, without any other evidence, the amount of the loss sustained. It would be to put insurers too much at the mercy of the insured, and might often work great injustice, by holding out to the insured a temptation to fraud, whose interest it would always be to sink the value of the *spes recuperandi* as low as possible. Juries, having no knowledge of the course and manner of proceeding in foreign courts, would seldom attach to it more than a nominal value, and the insured would in almost every case, in the name of a partial loss, substantially recover as for a total loss, with the advantage of all the chances of afterwards regaining the property itself. There would be no safeguard for insurers against fraud and imposition, whilst the assured, having a full knowledge of the situation of the vessel, and every thing relating to her, with the right to abandon or not at his election, would always be secure—abandoning in desperate cases, and claiming as for a total loss, and in others, retaining the right of property, and after recovering in the name of a partial loss, substantially the value of the property, turning round and recovering the possession of the thing itself, which ought of right to go to the insurer. The adoption of such a rule would go to defeat the very object of abandonment, which, with the great uncertainty that would always attend such a mode of coming at the amount of the loss sustained, is a sufficient objection to it.

In no view, therefore, of the subject, is the plaintiff entitled to recover either as for a total or a partial loss, and the direction to the jury by the judge, before whom the cause was tried, is right.


JUNE 1820.
Barney
vs
Insurance Co'y

CHASE, Ch. J. (a). This is an action on a policy of insurance, entered into by the defendants to the plaintiff on the 29th of September 1809, for the insurance of the schooner *Hawk*, her tackle, &c. from *Baltimore* to *St. Sebastians*. The first count in the declaration is for a total loss by capture on the high seas by persons unknown. On this count the question arises; and the decision of the court must depend on the construction of the stipulation contained in the policy, whereby the assured warrants not to abandon before condemnation. Independent of this clause in the policy, the right to abandon might be exercised at the discretion of the assured; and from the improper or premature exercise of this right, great inconvenience had been experienced by the underwriters, and losses sustained. To restrict the general exercise of this right, and to oblige the assured, after capture, to use their best endeavours, and all lawful ways and means in their power, to prevent a condemnation, this stipulation, by way of warranty, was inserted. Unless the court construe this stipulation as a condition precedent, which must be strictly complied with, the underwriters can derive no benefit or advantage from it. If such exposition is given to it by the court, and the abandonment is made prior to condemnation, the warranty is violated, the policy is avoided, and the plaintiff's right of action defeated, which, in my opinion, is the very effect and operation contemplated and intended by the parties, to insure a strict compliance with the stipulation inserted in the policy.

Without going into a minute detail of all the facts and circumstances stated in the bill of exceptions, I will content myself with referring to those material facts which relate to the question in this case. (*He here stated the material facts.*) On the admission that the condemnation would relate back to the time of the capture, and in that way to justify and give validity to the abandonment as

(a) This opinion of the Chief Judge was prepared by him after the first argument of the cause; owing to indisposition he did not attend at the last argument, or when the opinion of the court was delivered.

JUNE 1820. contended for; yet, as in the opinion of the court, there is no proof in this cause of any judicial or regular condemnation by a court of competent jurisdiction, to decide on the question of prize or no prize, in which opinion I understand all the members of the court to concur, it is unnecessary to give any opinion on the legal consequences derivable from such condemnation.


Bailey
vs
Insurance Co'y

As to the recovery for a partial loss: It appears to me that there is no proof in this case to warrant such recovery, on the supposition that in a case so circumstanced as this such recovery could be obtained. It is not proved that the vessel was restored, or that any compensation was made for the use and detention of her; but on the contrary, there is negative proof that the vessel was retained by the *French* government. In *De Hahn vs. Hartley*, 1 T. R. 543, which is a ruling decision, the law is established, that a warranty in a policy of insurance is a condition or a contingency, and unless that is performed there is no contract; and that it is perfectly immaterial for what purpose a warranty is introduced, but being inserted, must be strictly and literally complied with. In *Woolmer vs. Muilman*, 3 Burr. 1419, 1420, the ship and property were warranted neutral. It was stated that the ship, at the time, and before she was lost, was not neutral—adjudged to be no contract, because the property was not neutral; and judgment for the defendant.

In my opinion a violation of the warranty has been plainly and unequivocally proved by the abandonment at the time proved, and that the plaintiff cannot recover on the facts stated in the bill of exceptions; and I think the judgment of the court below ought to be affirmed.

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1820.

JUNE 1820

DAVIS *vs.* SIMPSON, *et al.*

Davis
vs.
Simpson

APPEAL from a decree of the Court of Chancery in favour of the complainants in that court. The case is sufficiently stated in the Chancellor's decree, and in the opinion of this court.

A trustee cannot purchase at his own sale either in person or by another, and if he does it is in law a fraudulent purchase.

KILTY, Chancellor, (February term 1817.) It appears, from the papers in this cause, that a petition was filed for a sale under the will of *S. Simpson*, by *S. Davis*, the present defendant, on which a decree was passed, and the sales thereon ratified, as well as those before made under an erroneous impression; in which last mentioned sales was included the one which is the subject of this suit. These sales were ratified after the usual publication; but although the present complainants, or any other persons interested, might have then objected, I am of opinion that their not objecting, and the consequent ratification, do not prevent an inquiry into the manner of the sale as prayed by the present suit, and do not prevent the court from giving relief; and the facts and circumstances proved as to the fraud and illegality of the sale to *Campbell*, are such as to leave no doubt on my mind that it ought to be set aside, with the acts which followed it. I therefore decree, that the sale by *Davis* to *Campbell* be set aside, and that the deed from *Davis* to *Campbell*, and the deed from *Campbell* to *Davis*, be and they are declared to be null and void to all intents and purposes, and that the land and premises mentioned in the said deeds be sold, &c. From this decree the defendant appealed to this court, where the cause was argued before BUCHANAN, EARLE, JOHNSON and DORSEY, J.

If the parties interested in having a purchase by a trustee at his own sale vacated, know the fact of the purchase, and being under no disability to question it, stand by and permit the trustee to use and improve the property as his own, a court of equity will not afterwards grant them relief.

If a trustee employs an agent to bid for him at his own sale, and he does bid, and the property is struck off and conveyed to him, and then reconveyed by the agent in pursuance of the previous agreement, in a bill in equity, to set aside both these deeds, it is unnecessary to make the agent or his representative, a party.

Pinkney and *Taney*, for the appellant, cited *Phillips' Evid.* 110, and *Dorsey vs. Dorsey's heirs*, decided in this court at December term 1813.

Pigman, for the appellees, cited *Rob. on Frauds*, 77, 554, 555. 2 *Madd.* 338. *Campbell vs. Walker*, 5 *Ves.* 678. *Lister vs. Lister*, 6 *Ves.* 631. *Ex parte Bennett*, 10 *Ves.* 394. *Baldwin vs. Smith and Miller*, in this court, June term 1818; and *Randall vs. Errington*, 10 *Ves.* 426, 7, 8. He also relied on the case of *Dorsey vs. Dorsey's heirs*, in this court, December term 1813.

JUNE 1820,

Davis
vs.
Simpson

EARLE, J. delivered the opinion of the court. The appellant in this cause was appointed executor of the will of *Solomon Simpson*, with authority to sell his real and personal estate, to raise a fund for the payment of legacies bequeathed by the will. He accepted the trust, and actually sold the whole estate, to the amount of \$15,228 12, more than \$7000 of which was purchased by *Aeneas Campbell*. Among other things he purchased the dwelling estate of the trustee at the price of ten dollars and ten cents per acre, and the purchase amounted to \$4541 23 $\frac{1}{4}$. The possession of the property, real and personal, purchased by *Campbell*, never passed from *Davis*, the trustee; and within less than five days after the sale, for the precise consideration of \$4541 23 $\frac{1}{4}$, the dwelling estate was conveyed to him, and on the same day he reconveyed it to *Davis*. The object of the bill is to vacate these deeds, and sell the estate for the benefit of the legatees, upon the ground, that the sale and conveyance to and from *Campbell* was fraudulent, he being the agent of *Davis*, the trustee, and having bid in the estate for him.

That a trustee cannot purchase at his own sale in person, or by another, and when it is done, that the act is deemed fraudulent, is law too well understood at this day to be controverted.

The law being out of the question, the merits of this case turn upon the simple fact, whether *Campbell* acted at the sale as the friend and agent of *Davis*, the trustee, or purchased in the estate, in controversy, for his own use.

In support of either side of this question, sundry depositions were taken, and are to be found in the record. They have been accurately examined by the court, and we have been brought irresistibly to the conclusion, that the dwelling estate of *Solomon Simpson* was not purchased by *Campbell* for his own use, but was bid in by him for the trustee, his neighbour and friend, *Solomon Davis*. *John Benson* proves a conversation between him and *Davis*, at the time the land was under the hammer, that leaves no room for doubt; and however suspicious his character may be, his testimony is corroborated by many circumstances, and by the evidence of several other witnesses, altogether unexceptionable.

Placing this case on a legal fraud then, which we think fully established, we will inquire, whether an unreasonable

acquiescence in the complainants has deprived them of the equity they would be otherwise entitled to? It is an un-deviating chancery principle, that the man who asks equity must be free from exception, and ready to do equity to others. Have these complainants, knowing all the suspicious circumstances attendant on the sale, drawn upon the trust fund for part payment of their legacies? Have they laid by to decoy *Davis*, the defendant, into expensive improvements of the estate they are endeavouring to take from him? Have they postponed the proceeding in chancery until *Campbell* was out of the way? If they have done all these iniquitous things, they are unworthy of the countenance of a court of equity. But are those dishonest deeds proved on them, or is there a semblance of such proof in the record? The court have been unable to find it. No evidence is adduced by the defendant in support of the réceipts he has filed, and in his account with the orphans court, he has not obtained credit for the alleged payments made to the legatees. It no where appears that the estate has been greatly appreciated in the hands of the defendant, by industrious cultivation and costly improvements. And the suit was not commenced in chancery immediately after the death of *Campbell*, as though the legatees had been waiting for that unfortunate event. The complainants have neither alleged nor proved, it is true, the reason of their delay; but it seems the two champions of the legatees, *James Simpson* and *George Borwick*, have been at law with the defendant for their portions of the personal estate of the testator, and this may be their excuse for not proceeding at an earlier period in equity. Be this as it may, the court perceive in the case nothing to charge them with unjust views.

The court cannot entertain a doubt on the question of proper parties, and approving of the chancellor's decree, do affirm it.

DECREE AFFIRMED

Davis
vs.
Simpson

JUNE 1820.

COURT OF APPEALS, JUNE TERM, 1820.

Snavely

vs

SNAVELY vs. M'PHERSON and BRIEN.

M'Pherson &c.

Where the return of a commission to take testimony, states that the commissioners took the oath annexed to the commission before A. B. the legal presumption is, that A. B. had authority to administer an oath.

If notice of the execution of a commission be given to the party against whom the evidence taken under it operates, it is sufficient, tho' no notice was given to the adverse party.

Notes or memoranda of a survey, or who is dead, endorsed on his certificate of survey, are, on proof of his hand writing, competent evidence to shew the original meaning of the land, to which they relate, but not to elongate or shorten, or in any manner to affect the position of the land as described in the grant of it.

APPEAL from *Washington* county court. Trespass *quare clausum fregit* on a tract of land called *Antietam Works*. The defendant (now appellant,) pleaded the general issue. A warrant of resurvey issued, and plots were returned.

1. At the trial below, at October term 1815, the plaintiffs offered in evidence the patent of *Antietam Works*, granted to them the 14th of May 1810, for 9548 acres of land; and offered evidence, that the trespass was committed as stated in the declaration, and as located on the plots in the cause; the plots and illustrations thereof were also given in evidence. The plaintiffs also proved their location of *The Resurvey on Hills and Dales and the Vineyard*, as located on the plots, with two degrees of variation; and the defendant having offered in evidence the patent of *The Resurvey on Hills and Dales and the Vineyard*, and his location of that patent on the plots; and having also given in evidence the certificate of said survey, dated the 8th of August 1763, and made for *Joseph Chapline*, and the patent on that certificate, granted the 9th of November 1771, to *Joseph Chapline* and *James Chapline* for 2256 acres. And the plaintiffs, in order to prove the truth of their location of *The Resurvey on Hills and Dales and the Vineyard*, having first shewn that the land, for which the defendant took defence, was a part of the land called *The Resurvey on Hills and Dales and the Vineyard*, and that he claimed and held the same under the original patentees, and that *John Murdock*, who made the original survey called *The Resurvey on the Hills and Dales and the Vineyard*, is dead, offered to give in evidence the following paper, viz. The certificate before mentioned, made for *Joseph Chapline*, of *The Hills and Dales and the Vineyard*, annexed to and on the back of which was this indorsement: "This resurvey is confined as follows, viz. From the beginning to No. 4 joins *Ward's Spring*. From number 4 to 9 joins *Elswick's Dwelling*," &c. (Signed) "J. M."

And which purported to be a copy of the original certificate of *The Resurvey on Hills and Dales and the Vineyard*, and of certain descriptions annexed thereto, and endorsed thereon, stating how the said tract lay and as connected with the adjoining lands, so far as such adjoining

lands were located on the plots in the cause, in order to prove their location of *The Resurvey on Hills and Dales and the Vineyard* to be correct. To this evidence the defendant objected; but the court, [Buchanan, Ch. J.] was of opinion that said paper was competent evidence to go to the jury, not to elongate or shorten any of the lines of the certificate, or patent issued thereon, or in any manner to alter or change the position of the land as described in the grant, but as the declarations of the surveyor who was dead, as to the original running of the lines of the land as expressed in the certificate and patent. The defendant excepted; and the verdict and judgment being against him, he appealed to this court, where the case was argued at June term 1817, before CHASE, Ch. J. EARLE, JOHNSON, MARTIN and DORSEY, J.

JUNE 1820.
 Snavely
 vs
 M'Pherson, &c.

L. Martin, for the appellant, relied on and cited the act of 1812, ch. 82. *Bladen's lessee vs. Cockey*, 1 Harr. & M'Hen. 230. *Scott's lessee vs. Ollabaugh*, 3 Harr. & M'Hen. 511. *Land. Hold. Ass.* 381, 396 to 400.

Taney, for the appellees, also relied on the act of 1812, ch. 82, and on *Peake's Evid.* 91. *Thornton's lessee vs. Edwards*, 1 Harr. & M'Hen. 158. *Shorter vs. Rozier*, 3 Harr. & M'Hen. 238; and *Shorter vs. Boswell*, decided in this court at December term 1808.

CHASE, Ch. J. delivered the opinion of the court. Without deciding the question, whether the notes of the surveyor could be received as the declarations of the surveyor, who is dead, on being proved, the court are of opinion that the notes in this case are not official acts, and can derive no additional power or efficacy by being annexed to the certificate; being offered as the private observations of the surveyor, his hand writing must be proved; and proof of the certificate is no proof of the hand writing of the surveyor, as to these notes. They cannot be considered as papers, copies of which can be received as evidence under the act of assembly of 1812, ch. 82.

JUDGMENT REVERSED.

A *procedendo* was awarded, and the cause remitted to the county court for a new trial.

2. At the new trial in November 1818, the plaintiffs read in evidence the plots and explanations, and proved

JUNE 1820. the trespass laid in the declaration. They also gave in evidence the grant of the tract of land called *Antietam Works*, and the tract called *The Resurvey on Hills Dales and the Vineyard*. And also gave evidence, that a certain *William Norris* was a deputy surveyor, and executed in the county the original survey of *The Resurvey on Hills Dales and the Vineyard*; and then offered to read in evidence the following commission, with the proceedings thereon, and the return of the same, and the deposition of *William Bayly* taken under said commission, and the notes annexed to the certificate of the survey of *The Resurvey of Hills Dales and the Vineyard*, marked A, (admitted to be the original paper referred to in the said commission,) as far as said notes were located on the plots in this case by the plaintiffs. This commission was in the usual form, authorising *John Marbury*, of the District of *Columbia*, to take testimony in the cause. The oath annexed to the commission to be taken by the commissioner, appeared to have been taken before *Thomas Cockran*, and that to be taken by the clerk to have been taken by him. The interrogatories exhibited to the commissioner by the plaintiffs were set out, as also his notice to the defendant to attend the execution of the commission, with an affidavit of its service. The return then proceeds as follows: "Depositions of witnesses produced, sworn and examined, at my office in *George Town*, by virtue of a commission hereto annexed, issuing out of the *Washington* county court, *Maryland*, to me directed, for examination of witnesses in a cause there depending, between *John M'Pherson* and *John Brien*, plaintiffs, and *Casper Snavelly*, defendant. The parties having first been notified by me of the time and place required to attend, and Mr. *Richard H. Fitzhugh* having been appointed clerk to the commission. Tuesday 17th March 1818, met according to appointment, when neither of the parties appeared in person, or by attorney. *William Bayly*, of *Washington* county, District of *Columbia*, aged about 76 years, a witness produced and sworn on the part of the defendant. To the first interrogatory he answers, and says," &c. "To the second he answers—He was very well acquainted with *John Murdock*, and lived with him as a clerk. *Murdock* was the surveyor of *Frederick*, when it included *Allegany*, *Washington* and *Montgomery* counties, and has been dead about

Snavelly

vs

M'Pherson, &c.

thirty years. To the third he answers—I have seen *John Murdock* write often; I know his hand writing well. To the fourth (looking upon the original certificate marked A. and signed *J. Marbury*, in an executed commission from said court in the case of *Snively vs. Brien*, enclosed,) he answers, that such certificate is in the hand writing of *Zachariah White*, and the signature of *J. Murdock* is his signature." He also proved that the notes annexed to said certificate were in the hand writing of *White*, and the initials of *Murdock's* name, at the bottom of said notes, ending with the words "*Joins Addition to Ward's Spring*," are in the writing of said *Murdock*, and the initials of *Murdock's* name to the notes ending with the words "*young apple trees*" to be the writing of said *White*. To the sixth he answered—He knew *Zachariah White*, that he was clerk to *Murdock*, and in his employment four or five years; had often seen *White* write, and was well acquainted with his hand writing. To the seventh he answered—Said *White* was *Murdock's* clerk at the time said certificate bore date; and that he was dead, and had been for many years. No other witnesses appearing, the commission was closed, and signed and sealed by the commissioner.

Snively
vs
M^rPherson, &c

Then follows the certificate of survey of *The Resurvey on Hills and Dales and the Vineyard*, dated the 8th day of August 1763, and signed "Pr. *John Murdock*." Annexed to, and on the back of the foregoing certificate, is as follows, viz. "This resurvey is confined as follows, viz. From the beginning to number 4 joins *Ward's Spring*. From No. 4 to 9 joins *Elswick's Dwelling*," &c. &c. "From the end of the 128th to the beginning joins *Addition to Ward's Spring*.
J. M."

To this commission and return, and the evidence taken under it, being read to the jury, the defendant, by his counsel, objected; but the court, [*Buchanan*, Ch. J. and *Shriver*, A. J.] overruled the objection, being of opinion, and so directing the jury, that the same was competent evidence to go to them, not to elongate or shorten any of the lines of the certificate or patent issued for *The Resurvey on Hills, Dales and the Vineyard*, or in any manner to alter or change the position of the land as described in the grant, but as the declarations of a person or persons now dead, of the place where the lines of the land, as expressed in the certificate and patent, did originally run. To this opinion

JUNE 1820. the defendant excepted; and the verdict and judgment being for the plaintiffs, he appealed to this court, where the cause was argued before EARLE, JOHNSON and DORSEY, J.

Snavelly
vs
M^rPherson, &c

Stephen, for the appellant, relied on the act of Nov. 1781, *ch. 20, s. 14*, and *Guppy vs. Brown*, 4 *Dall.* 410.

Taney, for the appellees, cited *The State vs. Leny*, 3 *Harr. & M^rHen.* 591. *Ridgely's lessee vs. Ogle and Leonard*, 4 *Harr. & M^rHen.* 126.

EARLE, J. delivered the opinion of the court. A commission to take testimony, executed in the District of *Columbia*, and returned by the commissioner therein named, with the evidence taken under it, were read by the plaintiffs in the court below to the jury, in the trial of this cause, and an objection was made by the defendant to the competency of the evidence, who contended that the commission and testimony under it ought not to be received as such. The court below thought they were legal evidence, and expressed an opinion, that the testimony could be used as the declarations of a person or persons then dead, of the place where the lines of the land expressed in the certificate of survey and patent did originally run, but could not be used to elongate or shorten any of the lines, or to alter or change, in any manner, the position of the land as described in the grant. In this opinion the court entirely coincide. It has been heretofore decided by this court, that notes or memoranda endorsed by the surveyor, or others, on a certificate of survey returned into the land office, make no part of the certificate, and that an office copy of such endorsements is not competent evidence. Thus stript of official consequence, the court cannot perceive that any dangerous use can be made of these notes or memoranda, especially when it is proposed to restrict the use of them, and not suffer them to be applied to decisive purposes in elongating or shortening lines, or in altering and changing the position of lands as described in the grant. They are to be considered in the light of private notes or memoranda, and their being endorsed on an official paper, ought not to prevent a party from using them. They are equivalent to the declarations of persons long made, and who at the trial are dead, and in this view the court are of opinion they are admissible proof.

The court are of opinion, that there is sufficient appear- JUNE 1820.
ing in the return of the commission, executed in the Dis-
trict of *Columbia*, to establish its due execution.

Carroll
vs
Norwood

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1820.

CARROLL, *et al.* lessee, *vs.* NORWOOD's heirs.

APPEAL from *Baltimore* county court. Ejectment for two tracts of land, one called *Enlargement*(a), the other *Brown's Adventure*, lying in *Baltimore* county. The declaration contained seven separate demises, viz. by *Charles Carroll*, of *Carrollton*, *Nicholas Carroll*, *Daniel Carroll*, of *Duddington*, and *Robert Carter*, each for an undivided fifth part, by *Abraham Van Bibber* for one undivided tenth part, by *Isaac Van Bibber* for one undivided fiftieth part, and by *William Smith* for four undivided fiftieth parts. Defence was taken on warrant by the then defendants, *Edward* and *Samuel Norwood*, for a tract called *The United Friendship*, as located on the plots in this cause.

1. At the trial in the county court at *March term* 1807, the plaintiff offered in evidence a certificate of survey and grant of the tract called *The Enlargement*, containing one hundred acres, surveyed for *John Israel* on the 10th of January 1720, and granted to him on the 10th of July 1724. And also offered the will of *John Israel*, dated the 13th of

J. I. obtains a certificate of survey, and pays the composition money, and devises the land contained in the certificate to his three sons. Himself and his sons, and those claiming under them, take & hold possession of the land from 1723 to about 1797. Under such circumstances, the legal presumption is, that a grant for the land regularly issued, and this presumption will be made, tho' it appears that a grant actually issued to J. I. after his death, such grant being entirely void, and producing no effect whatsoever.

J. L. I. being seized of part of a tract of land, executed a bond of conveyance for it to J. H. in 1730, and at the same time put J. H. in possession. J. H. assigned the bond to B. T. in 1745, and in

(a) See 4 *Harr. & M. Hen.* 287.

1749 put B. T. in possession. In 1750 J. L. I. executed a deed of the land included in the bond to B. T. This deed was not recorded until 1794, and then under a decree of the court of chancery. In 1760 J. L. I. executed another deed for the same land to E. N. J. H. and those claiming under him, held possession from 1730, the date of the said bond, until 1800. Held, that the deed from J. L. I. to B. T. could not operate as a feoffment for want of livery of seizin, nor as a release to enlarge the estate of the grantee, because the grantee had no legal estate, nor as a deed of bargain and sale, enrolled under the decree of the court of chancery, because it does not appear that E. N. had any notice of the existence of such a deed in 1760, when the one to himself was executed.

It is the province of the courts to construe grants and deeds, as well in regard to the land intended to be transferred, as to the estate intended to be created, and in all cases except that of a latent ambiguity, this construction must depend on the grants or deeds themselves, and not on matter *de hors*.

Calls are first to be gratified; when there are none, resort is to be had to course and distance.

The line of a tract of land may as well be the subject of a call as a natural object.

Calls are preferred to course and distance, because it operates most beneficially for the grantee.

The location of calls is to be decided by the jury.

The 4th, 5th, 6th, and 7th lines of a tract of land, were stated by the grant to run as follows, viz. N 160 ps then W 60 perches, with a tract lately taken up by G Y, then W S W 200 perches, with the said land, then S 230 perches, bounding on the said Y's land, &c. Held, that said 5th, 6th and 7th lines, must run with and bind on the lines of G Y's land, and that the 4th line must be controlled by the other lines, and terminate wherever the jury should find it would strike said Y's land, by either elongating or shortening it.

A plaintiff in ejectment may recover less than he claims, but it must be of the same nature. If he declares for an undivided part, he may recover any smaller undivided part, or if he declares for an entirety, any smaller entirety, but he cannot recover an entirety if he declares for an undivided interest, nor an undivided interest if he declares for an entirety.

A plaintiff in ejectment must, at the time of instituting his suit, and at the trial of the cause, have a legal title to the land he sues for.

JUNE 1820. January 1723, whereby he devised the said land, with other lands, to his three sons *John Lacon*, *Gilbert Talbot*, and *Robert Israel*, and their heirs for ever, to be equally divided between them and their heirs. The will was proved the 11th of March 1723. He further gave in evidence a deed from *John Lacon Israel* to *Benjamin Tasker*, dated the 15th of June 1750, together with a decree of the chancellor thereon, passed the 18th of December 1794, directing said deed to be recorded, &c. This deed, after reciting that *J. L. Israel* had passed his bond to *John Hurd*, to convey to him, and his heirs, one hundred acres of land, part of the land devised to said *J. L. Israel* by his father *John Israel*, and that that bond was assigned to *Tasker* and company, proceeds to convey to *Tasker*, his heirs and assigns, said one hundred acres, being the residue and remainder of any or all the lands devised to the grantor by his said father, or which by any other way had come to him as his son, after 150 acres, previously conveyed to *George Buchanan*, were taken out; in trust that said *Tasker* should hold the same as to one fifth for *Daniel Dulany*, his heirs and assigns; one fifth for *Charles Carroll*, his heirs and assigns; one fifth for *Charles Carroll*, of *Daniel*, his heirs and assigns; one fifth for Doctor *Charles Carroll*, his heirs and assigns; and one fifth for said *Tasker*, his heirs and assigns. He also offered in evidence a deed from *J. L. Israel* to *George Buchanan*, dated the 7th of July 1731, for 150 acres of the easternmost part of *Yates his Forbearance*, and a deed from *Gilbert Talbot Israel*, and *Charles Ridgely*, to Doctor *Charles Carroll*, dated the 26th of June 1732, for his, *Israel's*, right, &c. to all lands devised to him by his father *John Israel*. Also a deed from *Robert Israel* to *Charles Carroll*, Esquire, dated the 26th of August 1743, for all his right, &c. to all lands devised to him by his father *John Israel*; in trust as to one fifth for *Tasker*, *Dulany*, *C. Carroll* of *Daniel*, Doctor *C. Carroll*, and the said *C. Carroll*, Esquire, respectively. Also a deed from Doctor *C. Carroll* to *B. Tasker*, *C. Carroll*, Esquire, *Daniel Dulany*, and *Daniel Carroll* of *Duddington*, dated the 25th of September 1733. And also gave in evidence, that the lessors of the plaintiff, and those under whom they claim, have at all times, since the date of the will of *John Israel*, until about ten years before the commencement of this action, been in the possession and enjoyment of the land

Carroll
vs
Norwood.

called *The Enlargement*, under the title derived from said JUNE 1820. will; and that that tract was truly located on the plots by the plaintiff, and was the land for which this action was brought. The defendants then offered in evidence the grant of the tract of land called *The Enlargement*, herein before mentioned, granted to *John Israel*, and proved that *Israel* was dead at the time said grant issued. They also offered in evidence a grant of a tract of land called *The United Friendship*, granted to *John Larkin* the 1st of September 1687, being a resurvey on *Larkin's Addition* and *Ludlow's Lot*, containing 700 acres; also various mesne conveyances from said *Larkin* for *The United Friendship*, down to the father of the defendants, and that said tract was correctly located by them on the plots; and that they, and those under whom they claimed, had, at all times, from the date of said grant, been in the possession and enjoyment of said land as located by them. They also gave in evidence a grant of a tract of land called *Brown's Adventure*, granted to *Thomas Brown* the 10th of November 1695, for 1000 acres. Also a grant of a tract called *Yates his Forbearance*, granted to *George Yates* the 20th of July 1694, for 770 acres (a). Also a grant of a tract called *Yates' Addition*, granted to *John Yates* the 10th of October 1707, for 87 acres. And then prayed the direction of the court to the jury, that the lessors of the plaintiff, nor any of them, had made title to the tract called *The Enlargement*, for which the action was brought, because the grant for said land was issued to *John Israel*, after his death.

The Court, [*Nicholson*, Ch. J. and *Hellingsworth*, A. J.] refused the prayer, and directed the jury, that said *Israel* acquired an equitable interest in the tract called *The Enlargement*, in virtue of his certificate of survey, which interest was transmissible by last will, and that as he had devised the same to his three sons, in fee, as tenants in common, and the plaintiff had deduced and shown a title from said devisees, by sundry mesne conveyances, they might and ought to presume, from the great length of time since the date of the certificate of survey, that a grant had issued to the sons of *Israel*, provided they found that the possession of the land had been held under that title. The defendants excepted.

Carroll
vs
Norwood

Where there was a certificate of survey of land made in 1720, and a grant thereon in 1724, issued after the death of the grantor — *Held*, that the jury might and ought to presume a grant to the devisees, if possession of the land had been held under the said title

(a) See the expressions in this grant set out in 1 *Harr. & Johns.* 128.

JUNE 1820.

Carroll

vs

Norwood

J. L. J. being seized of part of a tract of land, executed a bond of conveyance to J. H. in 1730, conditioned to convey the land to him, & at the same time delivered possession to J. H. This bond was assigned by J. H. to B. T. in 1745, and possession delivered in 1749. In 1750 J. L. J. executed a deed of the land to B. T. which deed was not recorded until 1794, when it was enrolled by a decree of the court of chancery. In 1760 J. L. J. executed a deed to E. N. for the same land. Possession of the land was held by J. H. and those claiming under him, from 1730 until 1800.—*Held*, that the deed from J. L. J. to B. T. could not operate as a feoffment for want of livery of seisin. Nor as a release to enlarge the estate, for want of an estate in law in the releasee at the time of the execution of the deed. Nor as a deed of bargain and sale, enrolled under the decree of the court of chancery, it not being stated that E. N. at the time he obtained his deed, had notice of the deed from J. L. J. to B. T.

2. The plaintiff further offered in evidence a paper purporting to be a bond executed by *John L. Israel* to *John Hurd*, dated the 24th of December 1730, conditioned that he would, when required, make over, convey and transfer, by a lawful general conveyance, to said *Hurd*, his heirs, &c. 100 acres of land out of the tract called *Yates's Forbearance*, &c. And an assignment endorsed on said bond from said *Hurd* to *Benjamin Tasker*, and company, dated the 25th of February 1745; and proved the hand writing of *Richard Croxall*, thereto signed as a subscribing witness, and that said *Croxall*, and *George Buchanan*, the other subscribing witness, were both dead. He also produced a bond from said *Hurd* to said *Tasker* and company, dated the 26th of March 1747, reciting the above bond and assignment, and covenanting to deliver up to *Tasker* and company, possession of the said 100 acres, on the 10th of December 1749; and proved that *Richard Croxall*, whose name was thereto subscribed as a witness, was dead, and also proved his hand writing, and then offered to read the same in evidence. And further offered in evidence, that *Hurd*, and those under whom the plaintiff claims, were, from the year 1730 to the year 1800, in possession of the tract called *The Enlargement*, as located by the plaintiff. He also read in evidence the original deed from *John L. Israel* to *Tasker*, and others, dated the 15th of June 1750, and the decree of the chancellor thereto annexed. The defendants then offered in evidence a deed from *John L. Israel* to *Edward Norwood*, father of the defendants, dated the 28th of March 1760, conveying, among other lands, all his right and title in any tracts or parcels of land, devised to said *J. L. Israel* by his father's last will and testament, or which he had become entitled to as heir at law of his father. The plaintiff then prayed the direction of the court to the jury, that if the jury found the facts stated by the plaintiff to be true, that then he had made title in law to the estate and right of *J. L. Israel* in the land contained in his deed to *Tasker*, and others, of the 15th of June 1750, notwithstanding the deed or conveyance executed to the father of the defendants on the 28th of March 1760. The court gave the direction as prayed. The defendants excepted.

3. The plaintiff further offered in evidence certificates **JUNE 1820.**
 of surveys of the following tracts of land, viz. *Yates his Forbearance*, surveyed for *George Yates* the 20th of June 1683, for 770 acres (a); *Yates's Forbearance*, surveyed for *George Yates* the 17th of July 1683, for 140 acres; *The Forest*, surveyed the 23d of March 1678; *Pierce's Encouragement*, surveyed the 15th of October 1677; *Foster's Fancy*, surveyed the 29th of June 1669; *Hockley*, surveyed the 8th of August 1670; *Larkin's Addition*, surveyed the 3d of November 1673; *Lloyd of Ludloe's Lot*, surveyed the 20th of October 1667; *The Ludloe's Lot*, surveyed the 20th of June 1668, and *The United Friendship*; which last mentioned tract was surveyed for *John Larkin* on the 15th of October 1684; the certificate stated it as beginning at a red oak standing on a high point by a small gut on the N side of *Patapsco* river in *Baltimore* county, about a mile below the falls, and running (1) down the river E 160 ps. to another bounded oak, then (2) running N into the woods 200 ps. then (3) W 100 ps. then (4) N 160 ps. then (5) running W 60 ps. with a tract of land lately taken up for *George Yates* of *Anne Arundel* county, gent. (a), then (6) running W S W 200 ps. with the said land, then (7) running S 230 ps. bounding on the said *Yates's* land, then (8) S W 44 ps. to the aforesaid river, then (9) running down the river S and by W 28 ps. (10) S 38 ps. then (11) running S S E 90 ps. then (12) running E S E 20 ps. lastly (13) running E N E 200 ps. to the first bound tree, containing in all 700 acres of land." He also gave in evidence the grant of a tract of land called *United Friendship*, surveyed for *Edward Norwood* on the 23d of September 1765, under a warrant to resurvey the following tracts, viz. 505 acres, part of *The United Friendship*, granted to *John Larkin* for 700 acres, the 1st of September 1687; *Addition to Yates's Forbearance*, granted to *Emanuel Teal* the 13th of June 1734, for 54 acres; *Yates's Forbearance*, granted to *George Yates* the 20th of July 1684, for 140 acres; and *The Addition to United Friendship*, granted to *Edward Norwood* the 29th of September 1750, for 30 acres—"Beginning, for *Edward Norwood's* part of *United Friendship*, at the place where formerly stood a bounded red oak on the N. side of *Patapsco* river, it being the beginning of the whole tract called *United Friendship*, and running

Carroll

vs

Norwood

The courts are to decide on the construction of grants and deeds, subject only to the exception of the case of a latent ambiguity. In construing grants, the courts are to regard and to be governed by the intention of the parties, to be collected from the deed, if not incompatible with some rule or principle of law, and nothing extrinsic or *de hors* the deed, is to be resorted to for ascertaining such intention, unless in the case of a latent ambiguity. If there is a call in the grant, and course and distance, and they do not agree, the call is to be gratified. The jury are to ascertain and fix calls. There is no distinction between a line of a tract of land called for, and any natural or artificial boundary. The 4th, 5th, 6th, and 7th lines of a tract of land, were expressed in the grant to run as follow, viz "Then N 160 ps. then running W 60 ps with a tract of land lately taken up by G T; then running W S W 200 ps with the said land, then running S 230 ps bounding on the said T's land," &c.—Held, that the 5th, 6th, and 7th lines, must run with and bind on the lines of the land of G T, & that the 4th line must be controlled by the 5th, 6th, and 7th lines, and terminate on the line of T's land, wherever the jury may find it will strike the same by elongating or shortening the 4th line

(a) See this grant set out in 1 *Harr and Johns*, 128.

JUNE 1820. thence (1) N 13 W 335 ps. (2) E N E 80 ps. to the end of the fifth line of the whole tract, it being also at the end of the W 100 ps. line of a tract of land called *Yates's Forbearance*, then (3) bounding on *Yates's Forbearance*, and the whole tract called *United Friendship*, N 160 ps. (4) W S W 200 ps. (5) N 70 ps. thence (6) S W 44 ps. to the main falls of *Patapsco* river, but the true distance is 530 ps. to said falls, then (7) running down the said river S by W 28 ps." &c. He also offered in evidence two deeds, one from *John Larkin* to *William Chew*, dated the 25th of June 1702, for 550 acres, part of *The United Friendship*, and the other from *Hyde Hoxton* to *Edward Norwood*, dated the 14th of May, 1750.

Carroll
vs
Norwood

And also gave in evidence, that all the said certificates of surveys, and the said grant and deeds, were by him truly located on the plots. The defendants then offered evidence, that said grant and certificate of survey of *The United Friendship*, and the certificates of the two tracts called *Yates's Forbearance*, were by them truly located; and then prayed the court to direct the jury, that the fifth, sixth, and seventh lines of *The United Friendship*, must run with and bind on the lines of the land of *George Yates*, mentioned in the said grant and certificate of *The United Friendship*, wherever the jury shall find them to be. But the court refused to give such direction, being of opinion that the location of the tract called *The United Friendship* would bear a double aspect, and that what was its true location was a matter properly to be enquired of and found by the jury (a). The defendants excepted. Verdict and judgment for the plaintiff for the tract called *The Enlargement*, according to the plaintiff's location of the same, by a table of courses distinguished on the plots by the number one, beginning at the red letter E. On this judgment the defendants sued out a writ of error returnable to this court, where the cause was argued at *December Term* 1812, before CHASE, Ch. J. BUCHANAN and EARLE, J.

(a) This decision seems to be conformable to that made by the general court, and affirmed in the court of appeals, in the case of *Ridgely et ux Lessee, vs. Norwood* (1 *Harr & Johns*. 128,) on the very same grant; if that case was referred to in the court below, it was not cited or referred to by the counsel who argued this case in the court of appeals, nor by that court when they made their decision reversing the judgment of the court below.

T. Buchanan, Shaaff and Pinkney, for the plaintiffs in JUNE 1820. error. They cited *Carroll et al. Lessee vs. Norwood*, 4 Harr. & M'Hen. 287. *Savory's Lessee vs. Whayland*, 1 Harr. & M'Hen. 206. The act of 1785, ch. 72, s. 11. *Doe on Dem. Bowerman vs. Sybourne*, 7 T. R. 2. *Goodtitle Dem. Jones vs. Jones*, *ibid* 43. *Peake's Evid.* 316, 317. *Keen Dem. The Earl of Portsmouth et al. vs. The Earl of Effingham*, 2 Strange, 1267. *Warren Dem. Webb vs. Greenville*, *Ibid* 1129. *Helm's Lessee vs. Howard*, 2 Harr. & M'Hen. 82. *Dorsey's Lessee vs. Hammond*, 1 Harr. & Johns. 190, 194. *Cheney vs. Ringgold's Lessee*, in this court, December Term 1807. 2 Blk. Com. 339, and *Land Hold. Ass.* 288.

Carroll
vs
Norwood

Harper and Martin, for the defendants in error, relied on *Gittings Lessee vs. Hall*, 1 Harr. & Johns. 16, 22. *Thompson et al. Lessee vs. Brown*, 1 Harr. & Johns. 335. *Gibson's Lessee vs. Smith*, 1 Harr. & Johns. 253. *Davis et al. Lessee vs. Batty*, *Ibid*. 264. and *England Dem. Syburn vs. Slade*, 4 T. R. 682.

CHASE, Ch. J. delivered the opinion of the court. It has been conceded in the argument, that the facts and circumstances stated in the *first bill of exceptions*, constitute a sufficient foundation for the jury's presuming a grant to the sons of *John Israel*, independent and exclusive of the fact, that a grant had issued to *John Israel*, the father, after his death, which fact, it has been contended, repels and precludes the presumption, on the ground, that all the facts and circumstances originated from that source, and are in such manner to be accounted for. The grant which issued to *John Israel* was void *ab initio*, there being no grantee, *John Israel* being dead. The grant had no operation or efficacy in law, and consequently no estate or interest was or could be acquired under it. It was a mere nullity, and none of the facts or circumstances in the case could spring from it. There is a plain distinction between a void grant or conveyance and a defective deed, and on that ground the case of *Keen, on the demise of the Earl of Portsmouth et. al. vs. The Earl of Effingham*, 2 Strange, 1267, is distinguishable from the present. A void grant is no grant, and proves nothing. A defective conveyance may be good for some purposes, and legally inefficacious for others. In the case in *Strange*, although deeds were

JUNE 1820.

Carroll
vs
Norwood

made and enrolled for the purpose of making a tenant to the *præcipe*, yet proper parties did not join; that is, the person who had the life estate did not join in them. The uses declared were warranted and well created. The deeds were effectual for the purpose of declaring the uses of the recoveries, and they were also made for the purpose of making proper parties. These deeds were part of the recoveries and the foundation of them, and supposed to be effectual, but the tenant for life not joining in them, they were defective; and if the court had directed the jury to presume proper deeds, the direction would have been repugnant to the deeds appearing, and would also have concluded the interest of the tenant for life. In the case in question no grant exists. *John Israel*, the father, in virtue of his certificate of survey, and payment of the composition money, acquired an equitable interest in the tract of land called *The Enlargement*, which by his will was transmitted to his three sons. It is stated, in the case, that the lessors of the plaintiff, and those under whom they claim, have been in possession of *The Enlargement* ever since the date of the will of *John Israel*, (13th of January 1723,) under the *title* derived from the *said will*. Every fact in the case, on which the direction to the jury was prayed, existed independent of the void grant which issued to *John Israel*, and at the time it did issue the three sons were entitled to it, and not *John Israel*, who was dead. Here then is a clear equitable title shown in the sons of *John Israel*, and deduced from them to the lessors of the plaintiff, and a possession held in conformity thereto from 1723, until within ten years before the institution of this ejectment. The court are of opinion, that the opinion expressed by the court below, in the *first bill of exceptions*, be affirmed.

It does not appear by the facts stated in the *second bill of exceptions* that there is any evidence of a title deduced to the lessors of the plaintiff in the land in question. The deed from *John L. Israel* to *Tasker* cannot operate as a feoffment, for want of finding livery of seizin. It cannot operate as a release to enlarge the estate, for want of an estate in law in the releasee at the time of the execution of the said deed. It cannot operate as a deed of bargain and sale, enrolled under the decree of the court of chancery, the case not stating that *Edward Norwood*, the father of

the defendants, at the time he obtained his deed, had no- JUNE 1820.
 tice of the deed from *John L. Israel* to *B. Tasker*. The
 court are of opinion, that the opinion expressed by the
 court below, in the *second bill of exceptions*, be reversed.

Carroll
 vs
 Norwood

In expressing an opinion on the *third bill of exceptions*, the court will endeavour to state their ideas in as concise and plain a manner as possible, as to the grounds and principles of the law in relation to the true location of tracts of land in this state. It is the unquestionable right and jurisdiction of the courts to decide on the construction of grants and deeds, as well as to the description of the land which is to be transferred, as the quality and nature of the estate, subject only to the exception of the case of a latent ambiguity. The location must correspond with, and be in conformity to, the true construction of the grant as declared by the court. In construing grants the courts are to regard, and to be governed by, the intention of the parties, to be collected from the deed, if not incompatible with some rule or principle of law, and nothing extrinsic or *de hors* the deed is to be resorted to for ascertaining such intention, unless in the case of a latent ambiguity. If there is a call in the grant and course and distance, and they do not agree, the call is to be gratified if it is imperative or peremptory, and the course and distance are to be rejected, and the line is to be elongated or shortened to bring it to the call. It is the exclusive right and province of the jury to ascertain and fix calls according to the evidence legally admissible for that purpose, and the calls being ascertained, the lines must run accordingly, and will be controlled thereby, if the course and distance do not correspond with such calls. To show the true position of a tree, head of a creek, or line of a tract of land called for, recourse is often had to the relative situation of contiguous tracts, and various other circumstances, having the tendency to identify the call. There certainly can be no distinction between a line of a tract of land called for, and any natural or artificial boundary; they are all the subjects of proof, and when ascertained by the jury, are equally to be regarded, and the course and distance are to be governed by them, if the call is imperative. The reason which induced the courts, in construing grants, to give a preference to the location according to calls was, because such construction was most beneficial to the grantee in giving him more land, and that

JUNE 1820. principle having been adopted, has been generally adhered to, although in some few cases it might operate to the disadvantage of the grantee. Almost all locations, where there are calls as well as course and distance, are locations with a double aspect, because the course and distance seldom, if ever, agree with the calls. If that reason was to govern the courts in their decisions, the consequence would be, the transferring the power and jurisdiction of the courts to the jury in the exposition of grants, and the greatest uncertainty would prevail, and the greatest evils would result from it—contradictory determinations, without any power to control them. It is admitted that the calls in this case are imperative; indeed there can be no doubt about it; and being peremptory, they must be complied with, and the course and distance must be controlled by them.

Carroll
vs
Norwood

The court are of opinion, that the fifth, sixth and seventh lines of *The United Friendship*, must run with and bind on the lines of the land of *George Yates*, and that the fourth line of *The United Friendship* must be controlled by the said fifth, sixth and seventh lines of said land, and terminate on the line of *Yates's* land, wherever the jury may find it will strike the same by elongating or shortening the said fourth line. The court are of opinion, that the opinion expressed by the court below in the *third bill of exceptions* be reversed.

JUDGMENT REVERSED.

A *procedendo* being awarded, the cause was remitted to the county court for a new trial. After it was so remitted, the deaths of both the original defendants were suggested, and the heirs of *Edward Norwood* appeared and were made defendants. The deaths of *Nicholas Carroll*, *Robert Carter*, *Abraham Van Bibber*, and *William Smith*, four of the lessors of the plaintiff, were also suggested; and it seems, by the bill of exceptions, although not so stated in the record, that *Washington Van Bibber* was made a party lessor in the place of *Abraham Van Bibber*.

In ejectment on separate demises for undivided parts of the land, before the trial, all the lessors except one, had parted with their legal interest in the land, and the nature of his interest had been converted from an undivided portion

4. At the new trial of the cause in the county court, in September 1817, the plaintiff read in evidence the certificate of survey of a tract of land called *Roper's Increase* surveyed for *Thomas Roper* on the 20th of October 1667, and the grant of a tract called *The Enlargement*, for which this action was brought, granted to *John Israel* on the 10th of July 1724, for 100 acres. He also gave in evidence, that said two tracts were

truly located by him on the plots. And it was admitted by the parties, that the whole of said two tracts came by sundry mesne conveyances, and the will of the said *John Israel*, their father, to, and were legally vested in, *John Lacon* 18-
rael, *Gilbert Talbot Israel*, and *Robert Israel*, in equal por-
 tions, in fee simple, as tenants in common, previous to the
 year 1751, except two tracts of 100 acres each, parts of
Yates his Forbearance, which had before that time been le-
 gally vested, in fee simple, one in *Joshua Sewell*, and the
 other in *Robert Chapman*, by two several deeds from *John*
Yate, which are located by the plaintiff on the plots, and
 which he offered evidence to prove were truly located. He
 further gave in evidence a deed from *J. L. Israel* to *George*
Buchanan, for 150 acres, part of the tract called *Yates*
his Forbearance, dated the 7th of July 1731; and gave evi-
 dence that said deed was truly located by him on the plots.
 He also read in evidence a deed from *G. T. Israel*, and a
 certain *Charles Ridgely*, dated the 26th of June 1732, to
Charles Carroll, surgeon, of and for all the said *G. T. Is-*
rael's part of the tracts of land called *Yates his Forbear-*
ance, and *The Enlargement*; and a deed from *C. Carroll*,
 surgeon, to *Benjamin Tasker*, *Daniel Dulany*, *Charles Car-*
roll, of *Annapolis*, and *Daniel Carroll*, of *Buddington Ma-*
nor, of and for four undivided fifth parts, one fifth to each,
 of the land so conveyed to him by *G. T. Israel*, dated the
 25th of September 1733. He also gave in evidence, that
 some time after the execution of the deed last mentioned,
 and before the 26th of August 1743, *C. Carroll*, of *Bud-*
dington Manor, in the last mentioned deed named, died,
 and that all his right and interest under said last mention-
 ed deed, to the lands therein mentioned, descended to *Da-*
niel Carroll, his eldest son and heir at law, and his heirs.
 He also read in evidence a deed from *R. Israel* to *C. Car-*
roll, of *Annapolis*, purporting to be for the use of himself
 and of *C. Carroll*, surgeon, *C. Carroll*, son of *Daniel, D.*
Dulany, and *B. Tasker*, dated the 26th of August 1743,
 for all the said *R. Israel's* part of the lands called *Enlarge-*
ment, and *Yates his Forbearance*. He also read in evi-
 dence a bond of conveyance from *J. L. Israel* to *John*
Hurd, for 100 acres of land, part of the tract called *Yates*
his Forbearance, dated the 24th of December 1730, and an
 assignment of said bond to *B. Tasker*, dated the 25th of
 February 1745, and a deed from *J. L. Israel* to *B. Tasker*,

Carroll
vs
Norwood

In the whole, to a several and entire interest in part—Held, that although the plaintiff can recover less than he claims, yet it must consist of the same nature with that claimed. If he claims 100 acres, less than 100 may be recovered; if he claims an undivided moiety, an undivided third may be recovered, or any undivided portion less than a moiety; but he cannot recover an undivided part when he claims an entirety, nor an entirety when he demands an undivided portion.

If an ejectment is brought for land by the name of *E*, which is covered by another tract called *F*, to which the plaintiff makes title can he recover?

Whether or not to a deed executed in 1750, under which the plaintiff claimed, could operate otherwise than deeds of bargain and sale, he, to prove livery of seisin with those deeds, having offered evidence, that from the time of their execution, they and the lands therein named, and those claiming under them, down to the testators of the plaintiff, were in possession of the land, claiming it under the title derived from the grantors, until they were ejected by the defendant?

Whether or not the recital in a deed from *B* to *E*, was evidence of the existence of a deed stated to have been executed to them by their father for the same land, so as to exclude the presumption of *E* having died intestate as to that land; altho' the same reci-

JUNE 1820.

Carroll
vs
Norwood

tal was not evidence of the land having been conveyed to them by the recited deed?

To recover in an action of ejectment, the lessors of the plaintiff must have a legal title in the land at the commencement and trial of the cause

purporting to be for the use of himself and *C. Carroll*, Esq. of *Annapolis*, *C. Carroll*, surgeon, *D. Dulany*, and *C. Carroll*, son of *Daniel*, by the name of *Charles Carroll*, of *Duddington*, of and for the land mentioned and described in said bond to *Hurd*, being all the residue and remainder of any or all the lands devised to him by his father, *John Israel*, except 151 acres conveyed to *G. Buchanan*, which deed bears date on the 15th of June 1750, and was recorded by a decree of the chancellor on the 18th of December 1794. And the plaintiff and defendants admitted that the said deed must be so located as to lie entirely within the lines of *Yates his Forbearance* as truly located. And that all the undivided part, estate and interest, of *C. Carroll*, of *Annapolis*, in the said lands, or any of them, under and by virtue of said deeds, or any of them, descended to, and became legally vested in, *Charles Carroll*, of *Carrollton*, one of the lessors of the plaintiff, and his heirs; and that all the undivided part, &c. of *B. Tasker*, in and to the said lands, or any of them, became legally vested, by sundry mesne conveyances, in *Robert Carter*, one of the lessors of the plaintiff, and his heirs; and that all the undivided part, &c. of *C. Carroll*, of *Duddington*, in and to the said lands, or any of them, descended to, and became legally vested in, *Daniel Carroll* of *Duddington*, one of the lessors of the plaintiff, and his heirs; and that all the undivided part, &c. of *C. Carroll*, surgeon, in and to the said lands, or any of them, became vested, by sundry mesne conveyances, in *Nicholas Carroll*, one of the lessors of the plaintiff, and his heirs; and that said lessors, so far as they had any title to or estate in said lands, or any part of them, held the same as tenants in common at the time of bringing this action. And the plaintiff, to prove that all the interest and estate of *D. Dulany* of and in said lands, or any of them, became vested, by sundry descents and mesne conveyances, in *Abraham Vanbibber*, *Isaac Vanbibber*, and *William Smith*, lessors of the plaintiff, and their heirs, and that they held the same as tenants in common with each other, and with the other lessors of the plaintiff, at the time of bringing this action, read in evidence the last will and testament of the said *D. Dulany*, dated the 26th February 1752, in which will no mention is made of the land in dispute, nor is there any residuary devise, which the plaintiff relied on as evidence that said *Daniel Du-*

Dulany died intestate of said lands, and left *Daniel Dulany*, JUNE 1820.
 barrister, of *Annapolis*, his eldest son and heir at law.
 And also a deed from *Walter Dulany*, in said will men-
 tioned, bearing date the 26th of November 1759, to *D.*
Dulany, barrister, in the said will mentioned, son of *Dani-*
el, of and for one moiety of the part of the said lands,
 to which *D. Dulany*, the father, had been entitled by vir-
 tue of the aforesaid deeds, or any of them. And also a
 deed from *D. Dulany*, barrister, son of *Daniel*, to said
Walter, for one moiety of said lands, bearing date the
 same day with the deed last above mentioned, but execut-
 ed after it. [See these deeds recited in 1 *Harr. & Johns.*
 170, 171.] And also a deed from *D. Dulany*, barrister,
 to his son *Daniel Dulany*, for the other moiety of said
 lands, which deed is dated on the 16th of September
 1772. He also gave in evidence, that *D. Dulany*, (the
 third,) the grantee in the last mentioned deed, being enti-
 tled under said deed to the said moiety, and possessed
 thereof, joined and adhered to the king of *Great Britain*
 in the war of the revolution, in the year 1777, whereby all
 his estate and interest of and in said moiety became con-
 fiscated to this state, and was, on the 4th day of May, 1785,
 sold by the intendant of the revenue of the state, claiming
 to act by authority of and according to law, to *William*
Smith, one of the lessors of the plaintiff, *Josias Carvill*
Hall, and *Aquila Hall*; which said *J. C. Hall* and *A. Hall*,
 afterwards assigned and transferred their parts and inte-
 rest, under said sale, to said *W. Smith*, and *I. Vanbibber*,
 two of the lessors of the plaintiff, to which said *W. Smith*
 and *I. Vanbibber*, the chancellor of the state, claiming to
 act for and on behalf of the state, and by authority of
 law, conveyed the moiety last above mentioned, by two se-
 veral deeds, one to *W. Smith*, bearing date on the 12th of
 December 1792, for four fifth parts of said moiety; and the
 other to *I. Van Bibber*, bearing date the 11th of October
 1792, for one fifth part of said moiety. He also gave evi-
 dence, that before the war of the revolution, and after the
 date of the above mentioned deed from *D. Dulany*, of *An-*
napolis, barrister, to *W. Dulany*, his brother, the said *W.*
Dulany died, leaving *Daniel Dulany*, his eldest son and
 heir at law, otherwise called *Daniel Dulany*, of *Walter*, to
 whom all the said *Walter's* right, interest and estate, in
 the said land called *The Enlargement*, and *Yates his For-*

Carroll
 vs
 Norwood

JUNE 1820.

Carroll
vs
Norwood

bearance, being the right demised as aforesaid from *D. Dulany*, (the first,) in and to one undivided moiety of the one undivided fifth part, which originally belonged as aforesaid to *D. Dulany*, (the first,) descended and became vested in him in fee simple; and that *D. Dulany*, son of *Walter*, during said war, adhered to and joined the king of *Great Britain* against the United States of *America*, whereby his interest in said lands became and was confiscated to this state, and was afterwards sold by the Intendant of the Revenue of the State, claiming to act by authority of law, to *Abraham Van Bibber*, one of the original lessors of the plaintiff, and to *Thomas Stone* and *Daniel of Saint Thomas Jenifer*, whose rights under and by virtue of said sale, were afterwards legally transferred to *A. Van Bibber*, to whom the chancellor of the state, claiming to act for and on behalf of the state, and by authority of law, conveyed the last mentioned moiety in fee simple, in and by two several deeds dated, one on the 5th of February 1787, and the other the 19th of September 1792, for one half of the said moiety(a). He also gave in evidence, that *W. Dulany* and *D. Dulany*, sons of the first named *D. Dulany*, and those claiming under them, were in the actual possession of the said undivided tenth parts held by their said father as above mentioned, holding the same under the title derived from their said father, as tenants in common, with *C. Carroll* of *Annapolis*, *C. Carroll* of *Duddington*, *B. Tasker*, and *C. Carroll*, surgeon, and those claiming under them respectively, till they were turned out of possession, as hereinafter mentioned, by *E. and S. Norwood*. He also gave in evidence, that *A. Van Bibber* died on or about the 11th of June 1803, having first made and duly published his last will and testament in writing, by which he devised all his right, interest and estate, of and in the said undivided moiety of a fifth part, or undivided tenth part, to *Washington Van Bibber*, and his heirs, who hath since been made a party in this cause as the law directs(b). The defendants then read in evidence the patent of a tract of land called *The United Friendship*, granted to *John Larkin*, on the 1st of September 1687, for 700 acres; and a deed from the aforesaid *J. L. Israel* to *Ed-*

(a) See the title set out in 1 *Harr. & Johns.* 167.

(b) It is not so stated in the record.

ward Norwood, dated the 28th of March 1760, for a tract of land called *The Land of Goshen*, another called *Addition*, and another called *Cannon's Delight*; "also all other rights, titles, interests, claims and demands, and unto any tracts or parcels of land devised to said *J. L. Israel* by his father's will, or that as heir at law became the property of him the said *J. L. Israel*." And gave in evidence that said patent and deed were truly located by the defendants on the plots in this cause. And also gave in evidence, which was admitted by the plaintiff, that *E. and S. Norwood*, formerly defendants in this cause, were at the time of bringing this action, and long before, seized in fee, as tenants in common, of and in the tract of land called *The United Friendship*, and of and in all the estate, right, title and interest, in and to the lands called *The Enlargement* and *Yates his Forbearance*, which vested in the first mentioned *E. Norwood* under the deed to him from *J. L. Israel*; and that all the estate, title and interest, of *E. and S. Norwood*, the former defendants, in and to said lands, or any of them, hath passed to, and is now legally vested in, the present defendants in this cause. They also gave in evidence, which was admitted by the plaintiff, that a bill in chancery was filed by the lessors of the plaintiff against *J. L. Israel*, for ordering the recording of the deed from *J. L. Israel* to *B. Tasker*, and a decree thereon made, which is herein above set forth. They also read in evidence the act of assembly of 1815, chapter 147, which it is admitted was passed at the instance of the lessors of the plaintiff, who then composed the *Baltimore Company*, hereinafter mentioned, which act, it was agreed, should be read from any of the printed copies of the acts of the general assembly of this state. They also gave in evidence, and it was admitted by the plaintiff, that a bill in chancery, since the institution of this suit, was filed by a part of the lessors of the plaintiff against the remaining lessors of the plaintiff, which parties were known by the name of *The Baltimore Company*, for a division of the lands held in common by them, upon which bill and proceedings thereon, a partition was decreed and made of the tract of land called *Yates his Forbearance*, in and by which decree and partition all that part of the said tract which, according to its true location, covers and includes any part of the tract called *The Enlargement*, as located by the plaintiff on the plots in this

Carroll
vs
Norwood

JUNE 1820. cause, was decreed and assigned to *Washington Van Bib-*

Carroll
vs
Norwood.

ber, in severalty. The plaintiff then gave in evidence, that the original lessors of the plaintiff, or those under whom they claim under and by virtue of the several deeds from *J. L. Israel, G. T. Israel, and R. Israel,* were, before the time of bringing this action, actually ousted and turned out by *E. and S. Norwood,* the original defendants in this cause, of and from all that part of the tract of land called *The Enlargement,* for which this action was brought, as located on the plots in this cause, which is included within the lines of the tract called *Yates his Forbearance,* as located by him on said plots, and held the same till the present time. He also gave in evidence, that at the time of the execution of the deed from *J. L. Israel* to *E. Norwood,* of the 28th of March 1760, the said *E. Norwood,* the grantee, had notice of the said deed of the 15th of June 1750, from *J. L. Israel* to *B. Tasker,* and others. He also gave in evidence, that at the time of making the several deeds from *R. Israel* to *C. Carroll,* Esquire, of *Annapolis,* and others, and from *J. L. Israel* to *B. Tasker,* Esquire, and others, the persons to whom, or for whose use the said deeds and each of them were severally executed, received actual possession and livery of seizin of and in the lands purported and intended to be conveyed in and by those deeds severally and respectively. And the evidence which he offered to prove livery of seizin from *J. L. Israel* to *Tasker,* and others, consisted in this, that he produced the bond from *J. L. Israel* to *Hurd,* and the assignment thereof to *B. Tasker,* and company, and proved, that soon after the date of that bond, *Hurd* was in possession of the land in said deed mentioned, and remained in possession till the time of the assignment, or some short time after, when he delivered the possession thereof to the agent of *B. Tasker, C. Carroll,* of *Annapolis, C. Carroll,* surgeon, *C. Carroll,* of *Duddington,* and *D. Dulany,* who, and those claiming under them as aforesaid, remained in the actual possession and occupancy of said land till the execution of the deed last mentioned, and from that time till they were turned out of possession by *E. and S. Norwood* as aforesaid; and that *E. Norwood,* father of *E. and S. Norwood,* lived on *The United Friendship,* in the neighbourhood of the land mentioned in said bond, and set up a claim thereto at the time when possessi-

on was delivered to the agent as aforesaid, and from that JUNE 1820. time to the date of the deed of the 28th of March 1760. And the evidence which he offered to prove livery of seizin with the said deed from *R. Israel* to *C. Carroll*, of *Annapolis*, for the use of himself, and others, consisted in this, that he gave evidence to prove, that from the time of the execution of said deed the grantees, or the *cestui que use* therein mentioned, and those claiming under them, down to the lessors of the plaintiff, were in possession of said land, claiming it under the title derived in manner aforesaid, from *J. L. Israel*, *R. Israel* and *G. T. Israel*, until they were turned out of possession by *E. and S. Norwood* in manner aforesaid. And the evidence which he offered to prove that at the time when the deed from *J. L. Israel* to *E. Norwood* was made, the said *Norwood* had notice of the deed from *J. L. Israel* to *B. Tasker*, for the use of himself, and others, consisted in the depositions heretofore taken and filed in this cause, and given in evidence by consent. The defendants then prayed the court for their direction to the jury, that under the evidence aforesaid, the plaintiff was not entitled to recover; which direction the court, [*Dorsey*, Ch. J.] gave. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

Carroll
vs
Norwood

The cause was argued in this court, at this term, before BUCHANAN, EARLE and JOHNSON, J.

Harper, for the appellants, cited the act of 1785, ch. 72, s. 11. *Carroll's lessee vs. Norwood*, 1 Harr. & Johns. 174, 175, 179. *Norwood vs. Carroll's lessee*, ante —. *Griffith's et al. lessee, vs. Moore*, in the General Court May term 1791. *Runnington's Eject.* 227, 410. 1 Mod. 252. 5 Mod. 33. 2 Blk. Com. 324. *Gilb. Com. Pl.* 104. *Hob. 5*, and *Moale vs. Howard*.

Winder and Pinkney, for the appellees, referred to 3 Bac. Ab. tit. *Feoffment*, (A.) 145, (B. 2) 151. *Ibid* tit. *Joint-tenants, &c.* (L.) 708. *Phill. Evid.* 356, and *Co. Litt.* 273.

JOHNSON, J. delivered the opinion of the court. This was an action of ejectment brought to recover two tracts of land called *Brown's Adventure* and *The Enlargement*. The plaintiff having made out no case for the recovery of *Brown's Adventure*, the question was, whether he had a

JUNE 1820. title to the *whole* of *The Enlargement*, or *any part* thereof, for which he was *competent* to recover in this action?

Carroll
vs
Norwood

In the discussion of this case several points have been ably and ingeniously argued, on which it is not necessary for this court to form an opinion. The first was, whether two deeds, the one by *Robert Israel* to *Charles Carroll*, bearing date the 26th of August 1748, and the other from *John L. Israel* to *Benjamin Tasker*, dated the 15th of June 1750, under which deeds the plaintiff claims, could *operate otherwise* than as deeds of *bargain and sale*; and secondly, whether the recital contained in the deeds of indenture between *Walter Dulany* and *Daniel Dulany*, and *e converso*, was evidence of the *existence* of the *deed executed*, purporting to have conveyed the land, so as to *exclude* their *father* from having died intestate as to that land; and yet, that the same *recital* was not evidence of the land *having been conveyed* to them by the recited deed.

In the view the court has taken of this case, these points need not be determined, For if the plaintiff is incompetent to recover, supposing the deeds from the two *Israel's* to pass the land, and to vest the legal estate therein in the manner contended for on the part of the plaintiff, and supposing the recital in the deed from *Walter Dulany* to be adequate to cause full efficacy to the deeds of partition between *Daniel* and *Walter Dulany*, still giving them such effect, the plaintiff cannot recover in this action; and as the opinion of the court below was in general, that on the facts as stated, the plaintiff had no right to recover, the judgment must be affirmed.

The lessors of the plaintiff derive their title to the land through the deeds from *Robert* and *John L. Israel*, and it is contended that those deeds passed the land *to five persons equally in fee as tenants in common*. The portion of the land that *Daniel Dulany* was entitled to, having become liable to confiscation, was sold as confiscated land to *Abraham Van Bibber*, one of the lessors of the plaintiff, who having died pending the suit, on his death being suggested, his son *Washington Van Bibber* was made a party to the action.

Pending the present action a bill was filed in the court of chancery, by part of the lessors of the plaintiff, against the rest of them, (all of the parties being known by the name of *The Baltimore Company*,) and a decree was ob-

tained, by which *all that portion of The Enlargement*, JUNE 1820. which was owned in common by the company, and comprehended in *Yates his Forbearance*, was vested in severally in *Washington Van Bibber*. Subsequent to that partition, *The Baltimore Company* applied to the legislature, and obtained the passage of the act of 1815, *ch* 147, to vest in *Henry W. Rogers, Samuel J. Donaldson, and Thomas L. Emory*, all the land which belonged to *The Baltimore Company*, and had been sold by them, but not conveyed, and all the land that then remained unsold and undivided, in trust, for them to give deeds to those to whom any land had been sold and not conveyed, on compliance with the terms of sale, and to lay off, *sell and convey, the residue* of the land for the benefit of the company. Had this act preceded the application to the court of chancery for a partition, or before the partition took place, the whole of *The Enlargement*, in which the company had an interest, would have been transferred to the trustees, but as the division separated *Washington Van Bibber's* part, it is unaffected by this act of the legislature.

Carroll
vs
Norwood

It thus appearing, that all the lessors of the plaintiff had, before the trial of the cause, parted with their legal interest in the land, except *Washington Van Bibber*, and the nature of his interest being converted from an undivided portion in the whole, to a *several* and entire interest in part, the question is, was the plaintiff competent to recover?

An action of ejectment, although in form a fiction, is in substance a remedy pointed out to him who has a right to land, of which he is wrongfully deprived; it is the *title of the lessor*, and *not* of the *nominal lessee*, that is to be decided. If pending the action the *nominal lease expires*, the term may be enlarged; if the lessor dies, his representatives are to be made parties. But if the cause was to depend on the validity of the *nominal lease*, the term could not be enlarged, nor could the cause be affected by the *death* of the lessor; and yet before the passage of a recent act of assembly (1801, *ch*. 74, *s*. 38,) the death of his lessor, (there being but one,) abated the suit, although the nominal lease had a long time to run. To recover in this action of ejectment, the lessors of the plaintiff must have a legal estate in the land at the commencement and trial of the cause, and therefore, as all the lessors had parted with their legal estates before the trial, except *Washington Van Bibber*, no recovery could be had, unless for his portion, if it be com-

JUNE 1821.

Anderson
vs
The State

petent to recover that in the present action. The declaration has no count on a demise claiming the *entire part* of any portion of the land; and although in actions of ejectment the plaintiff can recover less than he claims, yet it *must* consist of the *same nature* with that claimed. If he claims 100 acres, less than 100 may be recovered; if he claims an undivided moiety, an undivided third may be recovered, or any undivided portion less than a moiety; but he cannot recover an *undivided* part when he claims an *entirety*, nor an *entirety* when he demands an *undivided portion*.

JUDGMENT AFFIRMED.

COURT OF APPEALS, (E. S.) JUNE TERM, 1821.

ANDERSON vs. THE STATE.

A defendant against whom a judgment has been rendered for a misdemeanor, is *ex debito justitiæ* entitled to prosecute a writ of error

Does such writ, during its pendency, work a suspension of execution on the judgment?

Can a bill of exceptions be taken in a criminal prosecution for a misdemeanor?

The refusal of an inferior court to grant a new trial cannot be assigned for error.

ERROR to *Dorchester* county court to remove the proceedings in a criminal prosecution against the plaintiff in error for misdemeanors.

The cause was argued at this term before BUCHANAN, EARLE, JOHNSON, and DORSEY, J. by

R. N. Martin, for the plaintiff in error; and

J. Bayly, (district attorney of the fourth judicial district,) *contra*.

DORSEY, J. delivered the court's opinion. The plaintiff in error was convicted in *Dorchester* county court of misdemeanors under the act of 1809, *ch.* 138, *s.* 4, *art.* 10, and sentenced to undergo a confinement in the Penitentiary for the term of five years. Upon this judgment he sued out a writ of error, by which the transcript of the record was removed to this court. The court do not hesitate to say, that a defendant, against whom a judgment has been rendered for a misdemeanor, is *ex debito justitiæ*, entitled to prosecute a writ of error, and that this court are bound to correct any errors which may appear in the record. We wish not to be understood as meaning to convey an opinion that a writ of error, during its pendency, works a suspension of execution on the judgment(a). Upon an examination of the record it appears, that the counsel for the traverser after his conviction, applied to the court below for a

(a) *Huguenin vs. Baseley*, 15 Ves. 180.

new trial, on the ground that they had misdirected the jury in matters of law, and the motion, which was reduced to writing, not only suggests the facts, but the opinion of the court as declared to the jury. Whether the traverser could, in the progress of the trial, have excepted to the opinion of the court, which was afterwards made the foundation of the motion for a new trial, is not the question now before the court; and we certainly do not mean to decide, whether a bill of exceptions can be taken in a criminal prosecution for a misdemeanor. But we are decidedly of opinion, that the refusal of an inferior court to grant a new trial cannot be assigned for error. *The Marine Insurance Company vs. Hodgson*, 6 Cranch, 218. The law has been considered as settled in this country beyond all controversy; and no case can be found in *England* where a superior tribunal, acting on the transcript of the record, or the record itself, brought before them by a writ of error, has entertained such a question. If the plaintiff in error had a right to except to the opinion which the court below declared to the jury, he ought to have done so at the trial. If the law has denied to him this privilege, the decision of the county court must be considered as final.

Barroll, &c.
vs
Reading.

JUDGMENT AFFIRMED.

COURT OF APPEALS, (E. S.) JUNE TERM, 1821.

BARROLL and CANNELL vs. READING.

APPEAL from a decree of the orphans court of Cecil county. The case is sufficiently stated in the court's opinion.

The cause was argued at this term before BUCHANAN, JOHNSON, MARTIN, and DORSEY, J. by

Chambers and Cosden, for the appellants, and
Carmichael, for the appellee.

The opinion of the court was delivered by BUCHANAN, J. It appears in this case that an instrument of writing,

the question, whether a will shall be admitted to probat, has a right, at any stage of the proceedings in the orphans court, prior to a final decision, to have a plenary proceeding directed, and an issue sent to a court of law for trial.

If the orphans court refuse such a proceeding, it is a proper subject for an appeal to this court.

The act of February 1777, ch 8, authorising a plenary proceeding by libel and answer, and directing the orphans court to summon a jury of twelve freeholders to their assistance, on the issue *deviavit vel non*, is repealed by 1798, ch. 101.

Under this last act, sub ch. 15, s. 16, 17, either party concerned in

JUNE 1821. *purporting to be the last will and testament of Andrew J. Peterson*, was exhibited in the orphans court of *Cecil* county, for probat, by the appellee, against which a caveat was entered by the appellants, and that pending the caveat, and after the depositions of several witnesses had been taken, an application was made to that court, on the part of the appellants, to direct a plenary proceeding by libel, and answer on oath, and to call a jury of twelve freeholders to their assistance, for the purpose of trying an issue, which was refused; and the *ninth* section of the act of February 1777, *ch. 8*, on which the application was founded, being repugnant to, and repealed by, the act of 1798, *ch. 101*, the court did right in rejecting the prayer. But the court was clearly wrong in refusing to direct a plenary proceeding, and an issue or issues to be made up and sent to a court of law for trial on the application of the appellants, as directed by the *sixteenth* and *seventeenth* sections of the *fifteenth sub-chapter* of the act of 1798, *ch. 101*, which are imperative. The regular mode of proceeding in opposition to the admission of a will to probat, is by caveat; and it may often happen, (and probably most frequently does,) that the necessity for a plenary proceeding and a trial by jury, is only discovered after a part at least of the testimony is taken; and at any stage of the proceedings, before final adjudication, either party may require it, and the court is not at liberty to refuse it. The objection that an appeal will not lie in such a case as this, and that the record is not properly before us, cannot be sustained. The language of the act of assembly is, "any person who may conceive him or herself aggrieved by any judgment, decree, decision or order, of the orphans court, shall have the liberty of appealing," &c. emphatically giving an appeal from any decision of the orphans court; and it is quite clear that a refusal of a prayer preferred by a party to a contest in that court, is a decision of the court upon such prayer. The court therefore *decrees*, that the judgment of the orphans court of *Cecil* county, admitting to probat the instrument of writing purporting to be the last will and testament of *Andrew J. Peterson*, be reversed, with costs to the appellants; and that a plenary proceeding, by bill and answer on oath, be had as prayed by the appellants, and an issue made up and sent to the county court of *Cecil* for trial; and that the orphans court of *Cecil* county

Barroll, &c
vs.
Reading.

take such order in the premises as may be necessary and proper for carrying this decree into full effect. JUNE 1821.

DECREE REVERSED, &c.

Gibson, &c.
vs.
Horton

COURT OF APPEALS, (E. S.) JUNE TERM, 1821.

GIBSON *et ux. et al.* Lessee, *vs.* HORTON.

APPEAL from *Queen-Anne's* county court. Ejectment for a tract of land called *Matthew's Enlargement*. The judgment of the court below was rendered on the following case stated, viz. That a grant regularly issued for the land mentioned in the declaration, and that the title to said land was regularly transmitted by descent or devise to *John Elliott*, who died, seized thereof in fee simple, on the 20th of November 1784. That a grant also regularly issued for the lands mentioned in his will, called *Grubby Neck* and *Buck's Range*, and that he died seized of the same in fee simple. He regularly executed his will on the 23d of October 1784, and at the time of his death had no other child, or children, than those mentioned in his will, nor were there any other descendants of any child or children of the deviser. The parts of the will on which the question before the court depended, were as follow: "I give and bequeath to my son *John Elliott*, my dwelling plantation called *Mathew's Enlargement*, containing 155 acres, and 90 acres in *Chester Forest*, near the Red Lyon Branch, to him and his heirs for ever. I give and bequeath to my son *Henry Elliott*, my plantation in *Caroline* county, known by the name of *Grubby Neck Addition* and *Buck's Range*, containing 225 acres, to him and his heirs for ever. In case my son *John Elliott* should die without lawful issue, my will is, that my dwelling plantation shall descend to my son *Henry Elliott*, provided he gives up his right to all my land in *Caroline* county, to be equally divided between my daughters *Susanna*, *Rachel*, *Mary*, *Elizabeth*, *Ruth* and *Rebecca*; and provided he does not give up said land, my will is, that my home plantation shall be equally divided betwixt my seven daughters aforesaid. In case my son *Henry Elliott* should die, failing of issue lawfully begotten of his body, my will is, that my daughters shall have my land in *Caroline* county." To his daughters he bequeathed all his personal estate. *John*

A devise of land charged with the payment of a sum of money in gross, no matter how small, gives the devisee on his paying such sum, an estate in fee.

A devise, on condition that the devisee will convey other lands which he has any interest in to third persons, also gives to the devisee, on his making such conveyance, an estate in fee in the land devised.

There is no instance in which a devise, charged with the payment of a sum in gross, has been held to give the devisee any other than an estate in fee simple.

JUNE 1821.

Gibson, &c
vs
Horton

was his eldest, and *Henry* his youngest son, and his children mentioned in his will survived him; *John* entered upon the lands devised to him, and was lawfully and peaceably seized thereof, and died in 1795, intestate, and without issue, never having suffered any fine or common recovery, or executed any deed of bargain and sale, to bar any entail, or supposed entail, created by his father's will. *Henry*, upon the death of his father, entered upon the lands devised to him, and was lawfully and peaceably seized thereof. Upon the death of his brother *John*, he legally gave up all the lands, and all his right therein, pursuant to his father's will, in *Caroline* county, to his sisters, and took possession of the lands which were devised to his brother *John*, called *Matthew's Enlargement*, and described in his father's will as his dwelling and home plantation. *Henry* died in 1811, without issue, seized and possessed of said lands, having devised them by his will, dated the 16th of July 1813, to his sister *Ruth*, in tail, which said *Ruth* is one of the sisters mentioned in his father's will, and who has since intermarried with the defendant, and who, in virtue of the marriage, entered and is possessed of said lands. *Henry* never suffered any fine, or common recovery, or executed any deed of bargain and sale, to bar any entail, or supposed entail, created by his father's will. The lands devised to *John*, called *Matthew's Enlargement*, containing 155 acres, were worth \$12 per acre, and those called *Grubby Neck Addition* and *Buck's Range*, containing 225 acres, \$7 per acre, at the time of his death. *Sarah*, (one of the lessors of the plaintiff,) the wife of *Gibson*, (another of the lessors,) is a daughter of the testator. The other lessors are the sons and daughters of deceased daughters of the testator; and *Ruth*, the wife of the defendant, is also one of the testator's daughters. Other daughters of the testator died intestate, and without issue, before the action was brought. The county court gave judgment for the defendant, and the plaintiffs appealed to this court.

Harrison and *Tilghman*, for the appellant, cited *Doe d. Ellis vs. Ellis*, 9 *East*, 382. *Tenny vs. Agar*, 12 *East*, 253. If *Henry* did not take an estate *in tail*, he did not take a *fee*. *Roe d. Peter vs. Daw*, 3 *Maule & Selw.* 518.

Carmichael and Chambers, for the appellee, relied on JUNE 1821.
Pow. on Dev. 250, 251, 252. *Roe vs. Jeffery*, 7 T. R. 589.
 A devise is to be beneficial to the devisee. *Shep. Touch.*
 296. *Hay vs. The Earl of Coventry*, 3 T. R. 83. *Roe vs.*
Daw, 3 Maule & Selw. 518.

Gibson, &c
 vs
 Horton

The opinion of the court was delivered by JOHNSON, J. After stating the case, he proceeded as follows: The lessors of the plaintiff are a daughter and the representatives of other daughters of *John Elliott*, the first testator, who on the death of *Henry Elliott* without issue, claim an interest in the home plantation, or *Matthew's Enlargement*, on the ground that *Henry Elliott* had not such an interest therein as enabled him to devise it to his sister, the wife of the defendant. To support the pretensions of the lessors of the plaintiff, it is contended, that *Henry Elliott*, under his father's will, took only a life-estate in *Matthew's Enlargement*, or an estate in fee tail. On the part of the appellee it is contended, that he had an estate in fee, and that it passed by his will to the wife of the defendant. By the language of the will of the father, and according to the legal import given to the expressions used, both *John* and *Henry*, under the clauses by which the land is given to them, took estates in fee simple, clearly and technically expressed; and it seems equally clear by the limitations over, the estates given to each of them are reduced to estates tail—If "*John Elliott* should die without lawful issue, my will is that my dwelling plantation shall descend to my son *Henry Elliott*"—In case "*my son Henry Elliott* should die, failing of issue lawfully begotten, my will is that the land given to him shall be equally divided betwixt my seven daughters," are expressions too clear to admit of the least doubt, but that each of the sons took only estates tail in the land, in the first instance, devised to them. But the question, on which this clause depends, is, what estate had *Henry* in the land devised to *John*, on the facts as stated, at the time *Henry's* will was executed? In general, where land is given without mentioning what interest is to pass, the fee simple is designed; but according to the well established rules of law, when nothing is mentioned as to the extent of the interest, and there is nothing more in the will than the devise of the land, a life estate only will pass, the reversion in fee devolving on the heirs at law. In the will in question, on the death of *John*, without issue, *Henry*

JUNE 1821.

Gibson, &c
vs
Horton

is to have the land; on the death of *Henry*, his sisters are to have that before given to him. The extent of the interest given to either not being specified, *Henry* would only take a life estate in the home plantation, and they (the sisters,) only estates for lives, as tenants in common, in the land devised to him. But the devise over to *Henry* depends on his giving up the land, before given to him, in value nearly equal to that of *John's*, supposing *Henry* to take an estate in fee therein. He did give up the one, and took possession of the other. Where land is given by will, without specifying the interest, charged with the payment of a sum of money in gross, no matter how small, the devisee, if he takes the land, must pay the sum; but his interest is by the charge enlarged to an estate in fee, which without such charge would have been but a life estate. If being charged with the payment of a sum of money in gross, will convert a life estate to an estate in fee, surely charging the devisee, or making the devise to him depend on his conveying land belonging to himself to other persons, must have the same effect. It was contended, that as *John* took but an estate tail, on his death *Henry* had no greater interest. There is nothing in the will by which an estate tail can possibly be established in *Henry* to the land before given to his brother. There are no words in the will, in the slightest degree, calculated to create such an estate. If the clause making it necessary for him to convey his land to his sisters, can have any effect, it must enlarge the estate to a fee simple. No instance, it is believed, exists, where an interest enlarged by a charge on land devised, has been restricted to an estate tail. It has been urged that the conveyance of the lands by *Henry*, is not a charge on, but collateral to the devise. The same might be said of the payment of a gross sum of money charged on the land; if the devisee refused to take the lands devised to him, he is not answerable for the money. But *Henry* elected to take the land with the terms imposed—he has complied with those terms—his sisters obtained the full benefit of them; it would be great injustice to confine or limit his interest to a life estate in the land received in lieu of that conveyed; nor, according to the rules of law, can his interest be so restricted. The judgment given by the county court is therefore affirmed.

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1821.

JUNE 1821.

WININGDER vs. DIFFENDERFER'S Lessee.

Winingder

vs. Diffenderfer.

APPEAL from *Baltimore* county court. Ejectment for a lot of ground in the city of *Baltimore*, being part of lot No. 50. The defendant in the court below, pleaded the general issue. A verdict was taken for the plaintiff, subject to the opinion of the court, on the following statement of facts, viz. It is admitted that *Christopher Guiesler*, being possessed and entitled to the premises in the declaration mentioned, for a term of 99 years, did, on the 17th of November 1782, duly make his will, and died on the 1st of January 1783, and that said will was duly proved; by this will he devised to his wife *Catharine* the use of the whole of his estate, both real and personal, during her natural life; but in case she should marry during her widowhood, then she was only to be entitled to one third of it; after her death, he gave to his son *Peter* the whole of his estate as aforesaid, unless he married, if he did, he was only to be entitled to two thirds thereof. He appointed his wife *Catharine* his executrix. *Christopher Guiesler*, at his death, left his said widow *Catharine*, and his son *Peter*, his sole devisees and representatives; *Catharine* took upon herself the execution of the will; and assented to the bequests and devises made by it, and in pursuance thereof took possession, (among other parts of the property of the testator,) of the premises mentioned in the declaration, and continued to reside on and possess the same from the death of the testator until her own death, which happened about the 26th of March 1816, and never married after the testator's death. The following proceedings and discharge were had by and before *John Dougherty*, *John Bankson*, and *Thomas W. Griffith*, esquires, the persons before whom they purport to have taken place, viz. "State of *Maryland*, *Baltimore* county, to wit. Whereas a certain *Peter Giesler*, of *Baltimore* county, after having actually remained in the prison of *Baltimore* county aforesaid, twenty days and upwards, in and by virtue of a writ at the suit of *George Hass*, for £37 10 0 debt, and 34 shillings and 10 pence costs, also the amount of officers fees, did, by his petition in writing signed by the said *Peter Giesler*, and addressed to *John Dougherty*, *John Bankson* and *Thomas W. Griffith*, esquires, justices

The certificate of justices of the peace of their proceedings under the act of 1774, ch. 28, relating to insolvent debtors, is of itself, evidence of the facts it contains, and a party claiming under such proceedings is not compelled to prove such facts by evidence alien to the certificate.

Where it appears by the proceedings of the justices under the above mentioned act, that the insolvent, at the time of applying for its benefit, had been in confinement for twenty days and upwards, and that afterwards, at the meeting of the Justices, the insolvent and the sheriff, the sheriff certifies to the justices that the insolvent had been in prison fifty-two days, the legal inference is, that he had not been confined for a longer period, altho' no negative words are used shewing that not to have been the case.

It is not necessary that it should appear negatively, in proceedings under the act in question, that the debts of the insolvent, at the time of his application, do not exceed 200l. sterling, it is sufficient if it appears affirmatively.

The omission of the word "or" which immediately precedes the words "to secure the same to receive or expect any profit or advantage," &c. in the oath required by the said act of 1774, does not materially change the meaning of such oath.

In a sheriff's deed, as trustee of an insolvent debtor under said act, it is not necessary to state the ex-

act notice given by him of the time of the sale of the property contained in the deed.

Whether proceedings under the insolvent laws are liable to all the objections incident to those of other special and limited authorities? *Quere.*

JUNE 1821. of the peace for said county, pray the benefit of the act of assembly of this state, entitled, 'An act for the benefit of insolvent debtors,' passed at March session 1774. And whereas we the said justices, did, on the 1st of August 1808, appoint a meeting to be held at the court-house for *Baltimore* county aforesaid, for the discharge of the said *Peter Giesler*, to wit, on the 1st of September next, in the year aforesaid, and issue a certificate of the said appointment in the words following, to wit: 'Whereas *Peter Giesler* hath petitioned us the subscribers, justices of the peace for the county aforesaid, and sets forth that he hath been confined in the gaol of *Baltimore* county aforesaid, twenty days and upwards, for debts he is unable to pay, and for want of bail; these are therefore to command you to produce the body of *Peter Giesler* on the first day of September next, at the court-house of the said county, at 4 o'clock, P. M. and see that due notice, according to law, be given to his creditors to appear and show cause, if any, why he should not be liberated according to law, and the act of assembly made for the benefit of insolvent debtors, passed at March session 1774, and this shall be your sufficient authority. Given under our hands and seals this 1st of August 1808.' Signed and sealed by the said three justices, and directed "To the Sheriff of *Baltimore* county." "And whereas on the 1st of September in the year aforesaid, we, the said justices and the said sheriff, in pursuance of the said appointment, did meet at the court-house aforesaid, and the sheriff aforesaid having produced the body of *Peter Giesler*, the prisoner, personally before us the subscribers, two of the justices aforesaid, and having proved to us that he did set up copies of the said notice and appointment of our said meeting, one at the door of the county clerk's office, and one other copy at the prison door of said county, on the 10th of August last, 1808, being twenty days and upwards previous to his discharge; and having also made known to us, the justices aforesaid, the cause of the imprisonment of the said *Peter Giesler*, who hath actually been imprisoned for the space of fifty-two days; and it appearing to us, the said justices, from the cause of the imprisonment of the said *Peter Giesler*, that the whole debts due and owing by the said *Peter Giesler*, do not amount together to the sum of £200 sterling money, or the value thereof in current money of this state.

Winingder
vs
Diffenderffer

And the said *Peter Giesler* having delivered to the sheriff JUNE 1821.
 a schedule of his whole estate, both real and personal,
 debts and credits, and also delivered a duplicate thereof to
 us, the said justices, to wit,—‘A schedule of the goods
 and chattels, debts and credits, of *Peter Giesler*, an insol-
 vent debtor.’ Then follows a list of debts due by *Peter*
Giesler, amounting to \$508 81, and his wearing apparel to
 amount of \$10. Signed by him, and witnessed by the two
 justices, *Bankson* and *Griffith*. “Which said schedule and
 duplicate have been subscribed by the said *Peter Giesler*, in
 presence of the said justices, who have subscribed our names
 as witnesses. And we, the said justices, at the request of the
 said *Peter Giesler*, administered to him the following oath,
 prescribed by the said act, of assembly, to wit: ‘I *Peter*
Giesler, do solemnly swear, that the schedule which I have
 delivered to the sheriff of *Baltimore* county, doth contain
 a full and true account, to the best of my knowledge and
 remembrance, of my whole estate, both real and personal,
 or that I have any title to, or interest in, and of all debts,
 credits, and effects whatsoever, which I, or any in trust
 for me, have, or at the time of my petition had, or am, or
 was in any respect entitled to in possession, remainder or
 reversion; and that I have not, directly or indirectly, at
 any time since my imprisonment, or before, sold, *les-*
sened (a), or otherwise conveyed, disposed of, or entrusted,
 all or any part of my estate, goods, stock, money, or debts,
 thereby to defraud my creditors (b), to secure the same to
 receive or expect any profit or advantage thereof. So help
 me God.’ Which said duplicate hath been by us trans-
 mitted to the clerk of the county aforesaid; and we the
 justices aforesaid, after delivering the schedule and dupli-
 cate aforesaid, and administering the oath aforesaid, trans-
 ferring the duplicate aforesaid, did, by our order in writ-
 ing, command the sheriff forthwith to set at liberty the
 said *Peter Giesler*, which order shall be sufficient to dis-
 charge and indemnify the said sheriff against any escape or
 action whatsoever. Witness our hands and seals this 1st
 day of September 1808.” Signed and sealed by said
Bankson and *Griffith*. *Dougherty*, *Bankson* and *Griffith*,
 were, at the time said proceedings took place, and when
 the said discharge was granted, justices of the peace for

Wininger
 vs.
 Diffenderfer.

(a) This word should have been *leased*.

(b) The word *or* omitted here.

JUNE 1821.

Winingder
vs
Diffenderffer

Baltimore county, duly qualified. *Peter Giesler* in said proceedings mentioned, is the *Peter Guiesler* the aforesaid devisee and son of *Christopher Guiesler*. A duplicate of said discharge and proceedings was duly and regularly transmitted to the clerk of *Baltimore* county court, and has there remained ever since. At the time of the release and discharge of said *Peter*, *John Hutchins* was the sheriff of *Baltimore* county, but died some short time afterwards, without having in any manner executed the duties imposed on him by said proceedings and discharge, as trustee of said *Peter*. At the death of *Hutchins*, *William Merryman* was duly elected, and qualified, sheriff of *Baltimore* county; and after having been so qualified, and whilst he was sheriff of said county, did, on the 28th of August 1810, duly execute a deed to *John Diffenderffer*, the lessor of the plaintiff, for the premises mentioned in the declaration in this cause. This deed (which was duly acknowledged and recorded,) recited, that in pursuance of authority vested in *Merryman*, he set up and exposed to public sale, after giving due notice, on the 25th of August then instant, all the estate, &c. of *Peter Guiesler*, of, in and to, a lot of ground No. 50, &c. and that at said sale *Diffenderffer* became the highest bidder and purchaser, for \$580, &c. Upon this statement the county court gave judgment for the plaintiff; and the defendant appealed to this court; when the cause was argued at this term before CHASE, Ch. J. BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

Pinkney, and *Williams*, (assistant attorney-general,) for the appellant, relied on the act of 1774, ch. 28, s. 1. *Johnson's lessee vs. Kraner*, 2 Harr. & M. Hen. 243. *Weems vs. Disney*, 4 Harr. & M. Hen. 156. *Gittings' lessee vs. Hall*, 1 Harr. & Johns. 23. *Lowes vs. Holbrook*, *Ibid* 154. *Gibson's lessee vs. Smith*, *Ibid* 253. *Parker vs. Rule's lessee*, 9 Cranch, 64, 70. *Williams et al. vs. Peyton's lessee*, 4 Wheaton, 77. *Houghton vs. Strong*, 1 Caine's Rep. 486, (and note.) *Delamater vs. Borland*, *Ibid* 594, (note.) *King vs. Fuller*, 3 Caine's Rep. 153. *Powers vs. The People*, 4 Johns. Rep. 292. *Rex vs. Mayer, &c. of Liverpool*, 4 Burr. 2244. *Trever vs. Wall*, 1 T. R. 154. *Peacock vs. Bell*, 1 Saund. 74, (note.) *Ladbroke vs. James*, *Willes' Rep.* 201.

Winder and *R. Johnson*, for the appellee, also relied upon the act of 1774, ch. 28, and *Johnson vs. Kraner*. Por-

ter's case, 1 *Coke*, 22, a. *Rowland vs. Veale*, 1 *Cowp.* 19. JUNE 1821.
Rex vs. Gayer, 1 *Burr.* 245. *Martin vs. Hunter's lessee*,
 1 *Wheaton*, 361. *Burr's Trial*, 25. *The State vs. Levy*, 3
Harr. & M'Hen. 591. *The Bank of Columbia vs. Ross*, 4
Harr. & M'Hen. 456. *Chapline vs. Shoot*, 3 *Harr. & M'Hen.*
 350; and the acts of 1798, *ch.* 101, *sub. ch.* 8; and Nov.
 1779, *ch.* 25, s. 18.

Wininger
 vs
 Diffenderffer

JOHNSON, J. delivered the opinion of the court. An action of ejectment was brought in *Baltimore* county court, to recover the land in question, by *John Diffenderffer's* lessee, and a judgment was given for the plaintiff on a case stated, and from that judgment the defendant has appealed to this court.

By the case stated it appears, that *Christopher Guiesler*, or *Kiesler*, was possessed and entitled to the premises in the declaration mentioned for the term of ninety-nine years, and on the 17th of November 1782, duly made and executed his last will and testament, by which he bequeathed to his son *Philip Kiesler*; and by his will his wife is appointed his executrix, who, after his death, in due form of law obtained letters testamentary thereon.

It also appears that the executrix assented to the bequests of the will, and in pursuance thereof took possession, (amongst other parts of the testator's property,) of the premises mentioned in the declaration, and that she died before the institution of this suit.

Peter Kiesler, on the death of his mother, took, or attempted to take, the benefit of the act, entitled, "An act for the relief of insolvent debtors," passed in the year 1774. If he obtained the full benefit and the relief of that act, then by operation of law, all his real and personal estate, either in possession, remainder or reversion, became vested in the sheriff of *Baltimore* county, who is directed, first giving twenty days notice by advertisement set up at the court-house door and other public places of the county where the land lies, to sell the same at public sale for the best price.

By the act of 1774, *ch.* 24, if any person committed or charged in execution, or for the want of special bail, at any time after he shall have actually remained in prison, by the space of twenty days, on such commitment or charge, shall petition any three justices of the peace of the coun-

JUNE 1821. ^{Winigder} ty wherein such prisoner shall be detained, for his discharge, the justices shall thereupon appoint a time for their meeting, not less than thirty nor more than forty days, at the court-house, or gaol, and shall certify in writing to the sheriff, who shall, twenty days at the least before the appointed time, affix one copy of the certificate at the door of the county clerk's office, and another at the prison door of the county; at which day so to be appointed, the justices, or two of them, as well as the sheriff, are to attend at the court-house or prison, and the sheriff shall produce the body of such prisoner before the justices who shall attend, and shall make known to the justices the cause or causes of the imprisonment, and the time he hath been actually imprisoned under such commitment; and if it shall appear that such prisoner hath been actually imprisoned as before mentioned, and it doth not appear from the cause or causes of imprisonment, or by the allegations upon oath, of the creditors, or some of them, that the whole debts amount to £200 sterling, then such prisoner may deliver to the sheriff a schedule of his whole estate, debts and credits, which schedule shall be subscribed by the prisoner before the justices, who shall also subscribe the same as witnesses, and at the request of the prisoner the justices shall administer to him the oath prescribed by the act.

By the 4th section of the same law it is provided, that no person shall obtain its benefit unless the petition is exhibited within sixty days after the commitment.

The land in question was sold by the sheriff of *Baltimore* county to the lessor of the plaintiff, and the right of the plaintiff below to recover, depends on the question, whether the title of *Peter Kiesler* passed, in virtue of the proceedings on his petition, to the lessor of the plaintiff, through the sheriff.

It appears, that on the 1st of August 1808, the application by petition was made to three of the justices of the peace of *Baltimore* county, who appointed the 1st day of September following for the meeting; that they certified in writing to the sheriff the application so made to them, and directed him to produce the body of the prisoner, to give due notice according to law to the creditors to appear and shew cause, (if any,) why he should not be liberated; and on the first of September, the justices and sheriff met, when the person of *Kiesler* was produced; the sheriff

proved to them that he did set up the notices at the places mentioned in the act, on the 10th of August last, being twenty days and upwards previous to his discharge, and at the same time made known to the justices the cause of the imprisonment, and that he had actually been imprisoned for the space of 52 days; and it appearing to them, from the cause of the imprisonment, that his whole debts did not amount to the sum of £200 sterling, or the value thereof, and the petitioner having delivered to the sheriff a schedule in conformity to the provisions of the above mentioned act, they administered an oath to him, and then gave him his discharge.

Wininger.
vs.
Diffenderffer

At the time of the petition, as disclosed by the certificate of the justices, *Kiesler* had actually remained in prison for twenty days and upwards, *in virtue of a writ at the suit of George Huss*, for £87 10 0 debt, and 34 shillings and 10 pence costs, and for officers fees. There was no other evidence produced to the court of the facts above set forth, except the proceedings themselves as returned to and deposited in *Baltimore* county court office.

Various objections have been made to those proceedings as being defective previous to the time appointed for the meeting of the justices, and as defective afterwards on account of the oath which was administered; and it has also been urged, that the sale and the conveyance did not transfer the land in dispute in this cause.

In the first place it was contended, that evidence *aliunde* ought to have been produced to prove that the statement of facts, as set forth in the proceedings, even admitting that that statement in every respect *corresponded* with the act of assembly, was correct. But this objection, as it is most unquestionably unfounded, was relinquished. If it could be sustained, then it must follow, that every person claiming property sold under the act of 1774, must secure and preserve, (if it was practicable, as most evidently it is not,) extrinsic proof, to establish the facts set forth by the officers selected to carry the law into execution.

But waiving this objection, it is said, that it doth not appear that the petitioner had been in confinement under the claim of the debt, and for the officers fees, for the time specified in the act, for although the sheriff made it known to the justices that he had been imprisoned 52 days, yet as no words are inserted that he had *not* been there mere-

JUNE 1821. *than 60 days*, and as a confinement for the latter period would exclude him from the provisions of the act, it is contended the proceedings are void.

Winingder
vs
Inffenderfer

It is stated that he had been, at the time of the application, in confinement for the term of twenty days and upwards, and on the first of September, (the day of meeting,) he is represented as then having been confined fifty-two days, it does not necessarily follow that he might not have been there longer than that space of time; but as it was the duty of the sheriff, from whom alone information of the fact was to be obtained, to disclose the whole truth, the court must infer, and no other fair inference can be drawn, that he had not been confined more than the fifty-two days; and as he is set forth to have been in confinement under the *two* claims on him, without specifying how long under the one, and how long under the other, the correct conclusion is, that the confinement was under both, for the period stated. It is said that it does not negatively appear that his debts did not exceed £200 sterling, but it affirmatively appears, that the claims under which he was imprisoned are under that sum, and as no allegations appear to have been made on the part of his creditors, on oath, setting forth the debts due from him exceeded that sum, the maxim *de non apparentibus et non existentibus eadem est ratio*, must apply.

As then the proceedings, under which the discharge took place, were regular previous to the oath being administered, will the oath that was taken vitiate the discharge, and divest the property out of the officer, in whom the law designed to deposit it for the interest of the respective parties?

The objection principally relied on is, that the word "or" as contained in the form of the oath before the words "or to secure the same to receive or expect any profit or advantage thereof," has been omitted, and it is contended that such omission renders the oath administered, and the one required by the act in question, substantially different. The prisoner, it has been insisted, might, consistently with the oath he took, have secured his property *to others to defraud* his creditors, provided he himself did not thereby receive, or expect to receive, any profit or advantage.

If the meaning of the oath, as administered, rested on the omission of the word "or" before the words following

it, then the objection would be sustained; but when the whole **JUNE 1821.** of the oath, as administered, is taken together, it appears improper to conclude that such conveyances or dispositions of his property could, without violating his oath, have been made, for as in the preceding part he swears that he has not "directly or indirectly sold, lessened, or otherwise conveyed, disposed of or intrusted, all or any part of his estate, thereby to defraud his creditors," how could conveyances of property, consistently with that part of the oath, have been fraudulently executed either for his own or any other person's benefit?

Winigler
vs
Defender for

But the omission of the word "or" in the place where it has been omitted in the case before us, does not change the meaning of the oath, on taking the context of the act of 1774 into view, as it will be perceived that the omission of this word does not materially vary the oath it prescribes, and the obligation is perfect without it; with the word inserted, the oath is, that conveyances have not been made to defraud creditors for his own or any other person's benefit; without it, that the insolvent "had not sold, conveyed, &c. to secure the same, to receive or expect any profit or advantage."

If then the proceedings are regular to the time of the discharge, has the property in question that passed to the sheriff been transferred by him to the lessor of the plaintiff?

This is a contest on the part of a stranger who, without disclosing any interest except being on the land in contest, now calls in question the validity of these proceedings. He objects to the sheriff's sale, because by the deed it is not disclosed what was the notice given. The deed now objected to is that of a public trustee, that is, one who is selected by operation of law, and against whose conduct none who were parties to the original proceedings make any opposition.

To sustain this objection would render inadequate most of the deeds by trustees under decrees in chancery, who always have their course of proceeding pointed out; but, whether it is pursued or not, never appears on the face of the deeds they execute for the property sold by them.

Although the court have determined on the various objections that have been made to the proceedings in this case, they do not wish it to be understood, that discharges under the insolvent laws are liable to all the objections that are usually relied on against proceedings of persons

JUNE 1821. limited by special authorities; it is sufficient to say, that the objections that have been taken to the proceedings given in evidence in this cause, are not sustained, and therefore the judgment of the court below, founded on their sufficiency, is affirmed.

Halk
vs
Mullin

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1821.

HALL vs. MULLIN.

Negroes held and claimed as slaves are presumed to be slaves

A slave over 45 years of age cannot be manumitted

The condition of slaves does not depend exclusively either on the civil or the feudal law

No contract, of any validity whatever, can be made with a slave, without consent of the owner

A devise of property, real or personal, to a slave, by his owner, entitles the slave to freedom, by implication

APPEAL from Prince-George's county court. 'Trespass *quare clausum fregit*, in a close called *Partnership*. The defendant, in the court below, (now appellant,) pleaded the general issue. The judgment of the court below was rendered on a case stated. The facts are sufficiently detailed in the court's opinion.

Judgment, by agreement of the parties, was entered for the plaintiff. The defendant appealed to this court.

The case was argued before CHASE, Ch. J. BUCHANAN, EARLE, JOHNSON, MARTIN, and DORSEY, J.

Pinkney. R. Johnson, and J. Johnson, jr. for the appellant, relied on the act of 1796, *ch. 67, s. 13. Burroughs adm'r. vs. Negro Anna*, decided in this court at *June term 1817. Cooper's Just. 109. 2 Blk. Com. 93. 4 Bac. Ab. tit. Legacies and Devises, (G.) 288. 1 Harr. & M'Hen. 559. Negro Sally vs. Beatty, 1 Bay's Rep. 260. Cooper's Just. (B. 2.) tit. 9. and the acts of 1715, ch. 44, s. 10, and 1787, ch. 33; and 1 Harr. & M'Hen. 559, Mr. Dulany's opinion.*

A. C. Magruder, for the appellee, cited *1 Blk. Com. 423. and Co. Litt. (sect.) 177.*

JOHNSON, J. delivered the opinion of the court. This was an action of trespass *quare clausum fregit*, brought in Prince-George's county court, by Dolly Mullin, the appellee, against William A. Hall. In order to bring the cause speedily before this court, where, let the decision of the county court have been what it might, the case was only to terminate, a judgment *pro forma* was entered in favour of the plaintiff, subject to the revision and determination of this court, on the statement of facts set forth and agreed on by the respective parties; and whether, on that statement,

the plaintiff was entitled to recover, is now for the deter- JUNE 1821.
mination of this court.

It is set forth in the case stated, "That *Benjamin Hall*, of *Prince-George's* county, was in his life-time possessed of a negro man named *Basil*, claiming the same as his slave, and exercising acts of ownership over him, as such, during the life-time of said *Hall*;" and that on the 4th of February 1803, he duly made and executed his last will and testament, in which is contained the following clause: "I hereby manumit and set free, from the time of my decease, my carpenter, called old *Basil*."

Hall
vs
Mullin

It is admitted that *Basil*, the person designed to be set free, was, at the time of *Benjamin Hall's* death, upwards of forty-five years of age.

By the will of *Benjamin Hall* certain property is given to his son *Henry L. Hall*, as well as to other children and grand-children of the testator, and *Henry L. Hall*, is made the executor, and took upon himself the trust.

It is also admitted that *Dolly Mullin*, the plaintiff below, was the slave of *Henry L. Hall*, and the daughter of *Basil*, to whom *Henry L. Hall*, (if practicable,) sold her, and in the month of April 1810, executed to him a bill of sale of her; and on the 26th of May 1810, *Basil*, as far as he was competent so to do, executed a deed of manumission to *Dolly Mullin*.

On the 6th of May 1817, *Henry L. Hall* duly made and executed his last will and testament, in which are contained the following clauses: "I give and bequeath to *Dolly Mullin* one hundred and forty-one acres of land, being part of a tract called *Partnership*, and part of what is called the manor land, (as heretofore surveyed and laid off, adjoining the now dwelling-house of *Basil Mullin*,) for the use and benefit of *Dolly Mullin*, and her son *Henry Mullin*, during the life of the said *Dolly Mullin*, and after her decease to be the right of the aforesaid *Henry Mullin*, his heirs and assigns for ever. I give and bequeath to my nephew *William A. Hall*, (the appellant,) my woman called *Milly*, and her future increase. I give and bequeath to *Dolly Mullin* two young negroes, one called *Joan* and the other *Aaron*. I give and bequeath to my niece *Anna M. Clarke*, my woman called *Rachel*, and my woman *Jenny and child*, and their future increase. I give and bequeath to my nephew *Benjamin H. Clarke's* youngest child, my

JUNE 1821. woman *Rachel's* daughter called *Friar*—To my nephew *Benjamin H. Clarke*, I give my man called *Harry Hickman*." And after other dispositions in regard to the real estate, the will contains the following clause: "*Item*. I leave and bequeath all the remainder part of my negroes free." It is admitted, that *Henry L. Hall* was seized in fee of the land devised to *Dolly Mullin*; and that after his death, she entered on the land devised to her, and became seized as the law demands, on which land, it is admitted, the appellant entered and committed the trespass, for which the suit was brought.

Hall
vs
Mullin

On these facts the question for the determination of this court is—Whether the plaintiff below was competent to recover? and this depends on the sole question, whether she was, in law, capable of taking the land devised (or intended to be devised,) to her?

If the deed of manumission from *Basil* to her was effectual to set her free, then she was of course competent to take the land. If it was not, then the next question arises, was she set free by the last will and testament of *Henry L. Hall*?

On the part of the appellee it has been contended, that the facts do not make it appear that *Basil* ever was the slave of *Benjamin Hall*, but merely that he held and claimed him as such. But as negroes held and claimed as slaves are considered to be slaves, and as *Basil* is stated to have been "possessed," held and claimed, during the life-time of *Benjamin Hall*, as his slave, such, in the opinion of the court, must be deemed his predicament, and of course, unless he obtained his freedom under the will of *Benjamin Hall*, he had no civil rights himself, and was incapable, by any act or instrument of writing he could execute, to give freedom to the plaintiff, his daughter; and the court are of opinion, that as he was upwards of 45 years of age, when *Benjamin Hall*, his master, died, he was not manumitted by his will, because of the positive provision of the act of 1796, ch. 67.

It has been contended on the part of the appellant, that the condition of slaves in this state is regulated by the civil law, and that, as by that law slaves could purchase property for the sole use and benefit of their masters, that therefore, by the bill of sale of *Dolly* to *Basil*, the right to *Dolly* passed out of *Hall*, and became immediately vested in

the then owners of *Basil*, who were the general representatives of *Benjamin Hall*. On the part of the appellee it is urged, that slaves in this state are similar to villains in *England*, when villanage existed in that country, and that, as in that country, when the villain purchased property it did not pass immediately by or through him to his lord, but remained in the villain until the lord entered on, or took possession of, the property; any disposition made of such property, before the entry was made, or possession taken, was valid.

Hall
vs.
Mullin

To support the position from the civil law, *Cooper's Justinian*, 107 and 109, was relied on. To support the right of the villain under the feudal law, *Littleton*, § 177, was cited.

As it appears by the civil law the property never abides for one instant in the slave, if the rights of *Dolly Mullin*, as derived from her father *Basil*, depend on that law, as *Basil* was incapable to manumit, no claim on her part can rest on a deed of his execution; but should her rights rest on the feudal law applicable to villanage, then as *Basil* never was disturbed in the possession of *Dolly* by any of the representatives of *Benjamin Hall*, or any other person, before or after the deed of manumission was executed, that deed would be competent to set her free, and of course render her capable to take the land devised.

But the condition and rights of slaves in this state, depend exclusively neither on the civil nor feudal law, but may perhaps rest in part on both, subject nevertheless to such changes in their condition, and capacity to contract, as the laws of this state prescribe, and as contained in various acts of our state legislature.

It is a well established rule of law, that no right can be derived under any contract made in express opposition to the laws of the place in which such contract is made.

By the act of 1715, *ch. 44, s. 11*, all persons are prohibited to "trade, barter, commerce, or any way deal with any slave," without the leave of the master, under a penalty. In the case before the court no assent was given to authorise a legal contract between *H. L. Hall* and *Basil*, and as such a contract, without the owner's assent, is expressly prohibited, it follows that no right can be derived under it, either to *Basil* himself, to the representatives of *B. Hall*, or to any person claiming by or through him.

JUNE 1821. From what has been said, *Dolly Mullin*, the plaintiff below, must be considered a slave unless she is set free by the will of *Henry L. Hall*, who must, notwithstanding all the dealings between him and *Basil*, be considered her master.

Hall
vs
Mullin

At the time the will of *Henry L. Hall* was made, it was completely in his power to have set her free, and the question is, has he done so by implication, or by the *true construction of his will, taking all its parts together?*

It was admitted, and could not be denied, that by the devise of the land, and the bequest of other property, to *Dolly Mullin*, she must be freed in order to give effect to such devise and bequest. Her freedom then would certainly be implied from the devise itself, in order to give it effect in the absence of circumstances rebutting such an implication. Those relied on are, the bill of sale to *Basil*, and his deed of manumission.

Nothing appears more manifest to the court, but that it was the intention of the testator that *none* of his slaves should remain slaves after his death, other than those he *named and bequeathed as slaves*; for in every instance, when he intended that they should pass by his will to others, as slaves, they are described by name, as manifestly appears by the clauses in the will before selected; and it is equally clear, that *all*, except *those* so given as slaves, he intended should be free. How different is the language of that part of his will disposing of a portion of his negroes as slaves, and that part giving another portion freedom. The first class are described by their *respective names*; the latter are included in the *sweeping* clause by which he gives freedom to "all the remainder part of my negroes."

Let us then suppose that *Dolly Mullin* had not been named in the will, and had turned out to be the property of the testator at the time he made his will, or at his death, would she not have been entitled to her freedom under the general clause by which freedom was given? As well might it be contended, that real property, to which the testator did not know he had a right, would not pass under a clause devising "*all the rest and residue of his estate.*"

But without the aid of the residuary clause she would have a right to freedom, under those parts of the will by which property was given to her; her freedom by implication, is indispensably necessary to give efficacy to those clauses of the will. Without such an implication, all the disposi-

tions of his property, made in her behalf, would be void; JUNE 1821.
with it, the will is carried into effect and complete operation.

Browne
vs
Kennedy

CHASE Ch. J. I am of opinion that negro *Basil*, being above the age of 45 years at the time of the death of *Benjamin Hall*, was not manumitted and set free by his will. That *Basil*, being a slave, was incapable of taking and acquiring any property in *Dolly Mullin*, under the bill of sale from *Henry L. Hall* to the said *Basil*, and that the said bill of sale was void. I am also of opinion, that *Dolly Mullin* being the slave of *Henry L. Hall*, the will of the said *Henry L. Hall* will operate, and is effectual to manumit and give freedom to *Dolly Mullin*, and that she acquired a capacity, and was rendered capable of taking, and did take, the lands devised to her under the said will. That the two clauses in the said will, the one by which he devises 150 acres of land to *Dolly Mullin*, and the other by which he gives freedom to his slaves, are simultaneous acts, and are so to be construed as will give efficacy to his will, and effectuate his intention fully as disclosed in his will. The testator imagined *Dolly* was free; she was not free, but a slave, at the time the will was made, and being a slave, the will operated to give her freedom, and the lands devised to her.

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1821.

BROWNE, *et al.* Lessee, vs. KENNEDY.

APPEAL from *Baltimore* county court. Ejectment for a tract of land called *Cole's Harbour*. The defendant in the court below, (now the appellee,) took defence on warrant,

The King of England has a right to grant land covered by navigable waters, subject to the right of the public to fish and navigate them.

The former *Proprietors of Maryland* acquired the same right of disposing of land covered by navigable waters within the *Province*, subject to the like restriction, under the charter by which the *Province* was granted to them; by the King, as the King had prior to the charter. This right is now vested in the state.

Where the lines of a grant of a tract of land include a navigable river, the soil covered by the river will pass by the grant, though it be not described as land *aqua cooperta*, where the grantor has himself title to such soil.

By the common law proprietors of lands, bounded by unnavigable rivers, have not only the right of fishing, but a property in the soil covered by such rivers, *ad filum medium aque*. This is also the law of this state.

If one holds land bounding on a navigable river, and is also entitled to the land the river covers, and grants the former land, describing it as lying on the river, and bounding it on the river, the grantee will be entitled, as well to the soil the river covers, as to the land expressly granted.

The State is entitled to unnavigable rivers, and to the soil they occupy, and if the State grants land, lying on such a river, and calls for the river as the boundary of the grant, the grantee becomes riparian proprietor, and entitled to the land the river covers, *ad filum medium aque*.

JUNE 1621,

Browne
vs
Kennedy

and plots were made. At the trial of the cause it was agreed between the parties, that on the 1st of June 1700, a tract of land called *Todd's Range* was granted to *James Todd*, for 510 acres, being a resurvey on a tract called *Cole's Harbour*, granted to *Thomas Cole* the 17th of November 1668, for 550 acres. This grant, according to its true location, included within its lines all the land described and granted in and by the two deeds hereinafter mentioned, one from *Charles Carroll* to *William Lyon*, and the other also from said *Carroll* to *Alexander Lawson*, as those deeds are located on the plots in this cause; the lines of this tract run across the stream called *Jones's Falls*, and included the whole of that stream for a considerable distance above and below the place where it is touched by the lines of the two above mentioned deeds. Before the 18th of April 1757, the tract called *Todd's Range*, by sundry mesne conveyances and devises, became vested in *Charles Carroll*, esquire, of the city of *Annapolis*, and his heirs; and on the day last mentioned he, by deed of that date duly executed, acknowledged and recorded, conveyed a part of said tract lying on the north west side of *Jones's Falls* and bounding on it, to *William Lyon*, in fee simple; which part is described by metes and bounds, courses and distances, as follow, viz. "Beginning," &c. "and running thence N. 33° 30', W. 5 ps. unto *Jones's Falls*, then bounding down and with the said *Falls* the twelve following courses, viz. S. &c. containing 13 and an half acres of land, more or less. On the 20th of May 1757, said *Carroll*, by deed of that date duly executed, acknowledged and recorded, conveyed to *Alexander Lawson*, and his heirs, another part of said tract, also binding on *Jones's Falls* on the south east side, opposite to a part of the land sold as aforesaid to *William Lyon*. This part is also described by metes and bounds, courses and distances, as follow, viz. "Beginning," &c. "and running thence N. 59° E 22 ps. N. 27° E. 12 ps. unto *Jones's Falls*, then bounding upon and with the said *Falls* the seven following courses, viz. N." &c. containing seven and an half acres of land more or less. These two deeds are truly located by the defendant on the plots; the stream called *Jones's Falls*, in all that part of it which ran through *Todd's Range*, as it ran at the time of making the patent and deeds, is also truly located on the plots by the defendant. Before the year 1745 a bridge was

directed across said stream, below the place where it is JUNE 1821.
 touched by any of the lines of either of said deeds, and
 was in that year, by act of assembly, declared to be a pub-
 lic highway, and has ever since been continued and kept
 up as such till this time. At the time of the grant of
Todd's Range, and until the year 1786, the ordinary or
 common tides flowed up *Jones's Falls* to the place marked
C D on the plots, but never flowed as high as the upper or
 northernmost part of the tract called *Todd's Range*, which
 extended a considerable distance above the place marked
C D, including the land on both sides. Until the year
 1787, boats frequently and regularly ascended said stream
 to the place marked *C D*, but never higher up. At the
 time of making said patent and deeds, said stream, at the
 place marked *F*, near *Gay-street* bridge, on the plots, was
 100 feet wide; at the place marked *C*, 82 feet wide; at the
 place marked *27*, 74 feet wide; at the place marked *f*, 47
 feet wide; at the place marked *G*, in the centre of the
 stream, 47 feet wide; and at the place marked *C D*, 45 feet
 wide—gradually diminishing in width throughout all this
 part of its course. All the estate and interest of *Alexan-*
der Lawson, under the deed to him, became regularly vested
 in *Elizabeth Lawson*, the original lessor of the plain-
 tiff in this cause, before the time of bringing this action;
 and on her death it vested in the present lessors of the
 plaintiff and their heirs. Before the bringing this action
 all the estate and interest of *William Lyon*, under and by
 virtue of the deed to him, was vested in *John Smith* and
Benjamin Williams, and others, and their heirs, as tenants
 in common, and under them the defendant claims as tenant
 at will. Some time in the year 1786, some of the proprie-
 tors of the lands on both sides of *Jones's Falls*, for their
 own benefit, and with the consent of the other proprietors
 of lands there, including *Alexander Lawson*, and those
 claiming under *William Lyon*, who was then dead, diverted
 the then course of *Jones's Falls*, by cutting a new chan-
 nel for its waters, as represented on the plots, and there
 marked as the "*canal of Jones's Falls*," and through that
 channel the waters have ever since continued to flow. Af-
 ter making of said canal, the old bed of the *Falls*, between
 the points where it is intersected by the canal, was gradu-
 ally filled up by the washing of the adjacent lands, by the
 persons under whom the defendant claims, and by the im-

Brown
 vs
 Kennedy

JUNE 1821. *provements made in the neighbourhood, and at the institution of this suit had wholly disappeared, the place being laid out and occupied as part of the several lots and streets in that part of the city of Baltimore.* On the 26th of January 1795, *Charles Carroll*, of *Carrollton*, the heir at law and general devisee of said *Charles Carroll*, of *Annapolis*, duly executed to *John Smith*, *Benjamin Williams*, and others, under whom the defendant claims as aforesaid, a deed, which was regularly acknowledged and recorded, and which is truly located on the plots; by which he conveyed to said *Smith*, *Williams*, and others, in consideration of the sum of £750 current money, "all that part of a tract of land called *Cole's Harbour*, or *Todd's Range*, lying and being in the county of *Baltimore*, (excepting such parts thereof as have been heretofore sold and conveyed,) which part is contained within the following metes, bounds, courses and distances, viz. Beginning for the same at," &c. "and running," &c. "to the middle or centre of the bed of *Jones's Falls*, then running in the middle or centre of said *Falls*, N." &c. &c. "on the east side of said *Falls*, then running and bounding on the east side of said *Falls* the following courses, S." &c. "and all the estate, right, title, interest, property, claim and demand whatsoever, either in law or equity, of him the said *Charles Carroll*, of *Carrollton*, of and in the aforesaid part of a tract of land and premises herein before mentioned to be bargained and sold," &c. All that part of land which is included within the claim and pretensions of the plaintiff, and in the defence of the defendant, as both are located on the plots, is a part of the old bed of *Jones's Falls* as it was before the stream was diverted in the manner above mentioned, and is now in the sole and exclusive possession and occupation of the defendant, and those under whom he claims, and who, before the time of bringing this action, actually ousted said *Elizabeth Lawson* therefrom. *Cole's Harbour* and *Todd's Range* are one and the same tract of land. Upon these facts, the court below, (*Bland* and *Hanson*, A. J.) (a), being divided in opinion as to the plaintiff's right to recover, there was a verdict and judgment against him, and he appealed to this

Browne
vs
Kennedy

(a) These Judges gave long and learned opinions, but as they are published at length in *Niles' Reg* Vol. 18, p. 225, it is unnecessary to publish them here. Judge *Bland's* opinion was against the plaintiff; Judge *Hanson's* for him.

court, where the cause was argued at this term before JUNE 1821.
CHASE, Ch. J. BUCHANAN, EARLE, JOHNSON and MARTIN, J.(a).

Browne
vs
Kennedy

Harper and Taney, for the appellant. They referred to *Harg. Law Tracts*, 6, 22, 32, 36, 37. 1 *Mod.* 105. *Carter vs. Murcot*, 4 *Burr.* 2164. *The Mayor and Commonalty of Oxford vs. Richardson*, 4 *T. R.* 439. 2 *Blk. Com.* 39, 40, 261, 262. *D. Dulany's Opinion* in 1 *Harr. & M'Hen.* 564. 5 *Bac. Ab.* tit. *Prerogative*, (B.) 495. *Cooper's Just.* tit. 1, s. 22, 23; and *Stevens vs. Whistler*, 11 *East*, 51.

Pinkney, Winder, and Williams, (Assistant Attorney General,) for the appellee. They cited 5 *Bac. Ab.* tit. *Prerogative*, (B. 2,) 497. *Hale de Jure Mar.* 32 to 35. 2 *Bac. Ab.* tit. *Of the Court of Admiralty*, 177. 5 *Com. Dig.* 102. *The King vs. Smith*, *Doug.* 444. *Shultz Ag. Rights*, 106, 136, *The Charter of Maryland*, sections 4, 16. *Smith and Purviance vs. The State*, 2 *Harr. & M'Hen.* 244. *Just. Inst.* lib. 2, tit. 1, s. 20, 22, 23. *Dig.* lib. 41, tit. 1, s. 7, 3. 1 *Brown's Civil Law*, 237, 238. 2 *Blk. Com.* 261. *Bracton*, lib. 2, ch. 2. *Pothier on Prop.* Nos. 158 to 164. *The Bulture Case*, 27, 58, 272. *Hale de Jur. Mar.* 5. *Carter vs. Murcot*, 4 *Burr.* 2164. 5 *Bac. Ab.* tit. *Piscary*, 319. *Co. Litt.* 4, 6; and 2 *Bac. Ab.* tit. *Grant*, (J.) 396.

CHASE, Ch. J. I am of opinion, that the lessors of the plaintiff have a right to recover the land in question to the middle bed of *Jones's Falls*; that *Charles Carroll* having title to the lands in question, and all rights, privileges and advantages, derivable therefrom, did, by his two deeds to *William Lyon* and *Alexander Lawson*, convey the same to them, and thereby did divest himself of all right and interest in the same.

Charles Carroll, prior to the said deeds, holding the said lands on both sides of *Jones's Falls*, had the right, privilege, and advantage of accretion by alluvion, or by the gradual recession of the water from the banks or shores of the *Falls*.

Charles Carroll, by his deed dated 18th of April 1757, to *William Lyon*, transferred all his right and interest to

(a) *Dorsey, J.* having been counsel did not sit.

JUNE 1821. him in the lands lying on the north side of *Jones's Falls*, as described in the said deed; and by his deed to *Alexander Lawson*, dated the 20th May 1757, transferred all his right and interest to the said *Lawson* in the lands lying on the south east side of said *Falls*, opposite to part of the land sold to *Lyon*.

Browne
vs
Kennedy

The grantees under the said deeds acquired a right to the accretion by alluvion, or the recession of the water from the banks or shores of *Jones's Falls*, within the limits of their respective deeds, *ad medium filum aquæ*, as incident or appurtenant to those parts of the land binding on *Jones's Falls*, according to the principles of the common law, common right, and common justice.

As the water receded from the land, or the land was increased or added to by alluvion, the lines of the land granted to *Lyon* and *Lawson*, binding on *Jones's Falls*, would attach to and bind with the water until the accretion got *ad medium filum aquæ*.

As to the right to accretion by the recession of the water from the banks, or by alluvion, it makes no difference whether the water is navigable or not, the owner of the land adjoining or contiguous to the water will be entitled to the benefit of accretion, as incident or appertaining to his grant, because his lines binding on *Jones's Falls* being the boundaries of his land, will run with and bind on the water, and so include the land made by accretion.

It is stated as part of the case, that the stream of *Jones's Falls* was diverted by cutting a channel with the consent of the owners of the land on *Jones's Falls*, in the year 1786, through which canal the waters have since flowed.

It is also stated, that until the year 1786 the common tides flowed up *Jones's Falls* to *C D*, marked on the plot, and that until 1786 boats frequently and regularly ascended *Jones's Falls* to *C D*, but never went up higher.

It is also stated, that after the making of said canal the old bed of the stream, between the points where it was intersected by the canal, was gradually filled up by the washing of the adjacent lands, by the persons under whom the defendant claims, and by the improvements made in the neighbourhood, and that the bed of the river hath wholly disappeared.

The question is now to be considered—Whether the lessors of the plaintiff, claiming under *Alexander Lawson*, are

entitled to the land to the middle bed of *Jones's Falls*, JUNE 1821.
 from the lines of the land conveyed to *Alexander Lawson*
 binding on the *Falls*, or what part thereof?

Browne
 vs
 Kennedy

I lay it down as a position indisputable, that *Charles Carroll*, by his two deeds to *William Lyon* and *Alexander Lawson*, transferred to them all his right and interest in the lands in controversy, with all the privileges and benefits appertaining to the same, and consequently nothing passed by his last deed under which the defendant claims.

The diverting the water by the canal cut in 1786, with the consent and approbation of the owners of the land on *Jones's Falls*, could not diminish the interest which accrued to *Alexander Lawson* under his deed from *Charles Carroll*, nor could he be thereby deprived or divested of any right or privilege derived under it.

The gradual filling up of the *Falls* by the washings from the adjacent lands, would benefit *Lawson* by adding to his land binding on his side of the *Falls*.

The rights of *Lawson* could not be divested by the acts of those under whom the defendant claims, in filling up the *Falls*, such acts would operate beneficially to *Lawson*, and would not be allowed to interfere with his rights by alluvion.

The filling up by the washings from the improvements in the neighbourhood, would be for the benefit of those holding the lands to the *Falls*, and must have been gradual and imperceptible, which is the precise and proper definition of accretion by alluvion.

Although *Jones's Falls* was not navigable higher up than *C D*, after the year 1786, yet the stream remained, but was gradually filling up from the time the canal was cut, by the washings from the adjacent lands, the improvements made in the neighbourhood, and the acts of those under whom the defendant claims; all which causes operated for the benefit of all those who held lands on the *Falls* higher up than the canal, and not for the exclusive benefit of the defendant, and those under whom he claims, who had only a common right, with the other owners on *Jones's Falls*, to the accretion made from their respective shores.

It is not stated in the case what were the acts of the persons, under whom the defendant claims, which contributed to the filling up of the stream, nor the extent of those acts. The filling up of the stream must have been by the wash-

JUNE 1821. ings from the adjacent lands, and the improvements made in the neighbourhood, in which the acts of those under whom the defendant claims might be included.

Browne
vs
Kennedy

If the court was warranted in presuming that the acts of those under whom the defendant claims were the depositing of earth and filth on the shore of the *Falls*, within the limits of the deed to *William Lyon*, still they could not be entitled to accretion beyond the middle bed of the stream.

From the dates of the deeds to *Lyon* and *Lawson*, anno 1757, to the year 1786, the time of cutting the canal, *Lyon* and *Lawson* were entitled to the benefit of accretion by alluvion, a space of 29 years. The canal having been cut with the consent and approbation of all the owners of the lands on *Jones's Falls*, that act could not, and was not intended, to operate more to the advantage of one proprietor than another, and no right previously acquired could be divested by it.

I am of opinion, whether the accretion was by alluvion, the recession of the water from the shores, or the depositing of earth and rubbish in *Jones's Falls*, by the respective owners, or others, since the canal was cut, the legal effect is the same; and the plaintiff is entitled to recover *ad medium filum aquæ*, or to the place where it has been ascertained on the plot to be. I do not think it is necessary to go into an inquiry into the rights of the King or the Proprietary. I have no doubt the King, by the charter to the Proprietary, granted all the rights he enjoyed within the limits of the charter, subject to such savings and exceptions as are contained therein, and that the Proprietary had a right to grant the land, covered by a navigable river, without interfering with or affecting the public or common right of user for the purposes of navigation and fishing, and that the grantee, the courses of whose grant bound on the river, could claim the land, and would hold it, as the water receded from the land so granted, or the land was added to by alluvion, or depositing earth and rubbish on the shore; or in the water between the shore and the middle bed of the river, by a stranger. I am also of opinion, that the State of *Maryland* is invested with all the rights within the boundaries of the charter as the King of *Great Britain* ever did or could enjoy.

BUCHANAN, J. The first question arising from the facts JUNE 1821.
 in this case is, Whether the property in the soil covered
 by the waters of public or navigable rivers, was vested in
 the Lord Proprietary by the charter of *Maryland*?

Browne
 vs
 Kennedy

It is very certain that by the common law the right was
 in the King of *England*; and it seems equally clear to me,
 that he had the capacity to dispose of it *sub modo*. What-
 ever doubts are entertained on the subject, they probably
 have arisen from inattention to the distinction between the
 power of granting an exclusive privilege, in violation or re-
 straint of a common piscarial right, or other common right,
 as that of navigation, and the power of granting the soil
aqua cooperta, subject to the common user. The subject
 has, *de communi jure*, an interest in a navigable stream,
 such as a right of fishing and of navigating, which cannot
 be abridged or restrained by any charter or grant of the
 soil or fishery, since *magna charta* at least.

But the property in the soil may be transferred by grant
 —*Hargrave's Law Tracts*, 17, 22, 36, 37—subject, how-
 ever, to the *jus publicum*, which cannot be prejudiced by
 the *jus privatum* acquired under the grant. This distinc-
 tion runs through all the books, and wherever grants have
 been held not to pass the soil, it was not because the King
 had not the capacity or right to grant it, but because there
 were not apt words in the grant to effect the purpose, as in
 the case of the *Attorney General vs. Sir Edward Farmer*,
 in the Exchequer Chamber. 5 *Bac. Ab.* tit. *Prerogative*,
 495. 2 *Mod.* 106. *Sir T. Raym.* 241. And it was there
 admitted, that the King might grant a part of his seas by
 express name—so a grant of *incrementa maritima*, will not
 pass lands that often happen to be relict by the sea, be-
 cause that is not so properly *maritimum incrementum*; and
 besides, the soil itself under the water is actually the
 King's, and cannot pass from him by such an uncertain
 grant as *maritima incrementa*, but it must pass a present
 interest—*Harg. Law Tracts*, 18. But in the same page
 it is said, that if the King will grant land adjacent to the
 sea, together with a thousand acres of land covered by the
 waters of the sea, as usual of the same land, &c. adjacent,
 such a grant as may be penned will pass the soil itself, and
 if there shall be a recess of the sea leaving such a quanti-
 ty of land, it will belong to the grantee. And it will be
 found, on examination, that the right of the King to grant

JUNE 1821. the soil *sub modo*, has never been denied; the question, whether the soil passed or not, being always made to depend on the construction of the grant, arising from the particular expression used.

Browne
vs
Kennedy

The 4th section of the charter to Lord *Baltimore*, has these words—"Also we do grant, and likewise confirm, unto the said Baron of *Baltimore*, his heirs and assigns, all islands and islets within the limits aforesaid, and all and singular the islands and islets from the eastern shore of the aforesaid region, towards the east, which have been, or shall be, found in the sea, situate within ten marine leagues from the said shore; with all and singular the ports, harbours, bays, rivers and straights, belonging to the region or islands aforesaid, and all and singular the soil, plains, woods, mountains, marshes, lakes, rivers, bays and straights, situate or being within the metes, bounds, and limits aforesaid, with the fishings of every kind of fish," &c. with a saving in the 16th section to the King, and his successors, and to all the subjects of the Kingdoms of *England* and *Ireland*, of the liberty of fishing for sea fish, &c. The language of the 4th section of this instrument is too plain and explicit to admit of any doubt, and is strengthened, rather than weakened, by the saving in the 16th section, and clearly passed the property in the soil, covered by any of the waters within the limits of the charter, to the Lord Proprietary; who, thus become owner of the soil, subject to the common right of fishing and of navigation, had full power and authority to dispose of it. By his grant of the 1st of June 1700, of the tract of land called *Todd's Range*, which appears to have been a resurvey on *Cole's Harbour*, all the land covered by the water of *Jones's Falls*, which is included within the lines of the grant, passed to *James Todd*, the grantee, subject to the same public easements; there being no doubt, that where the lines of a grant include a stream, the soil covered with water makes a part of the grant, and passes with the rest, without being described as land *aqua cooperta*; and was held by *Charles Carroll*, charged with the same *jus publicum*. The question remaining to be examined is, whether *William Lyon*, and *Alexander Lawson*, under their several deeds from *Charles Carroll*, took *ad filum medium aquæ*, or were respectively restricted to the margin of the river, leaving the title to the bed of the stream in *Charles Car-*

roll? For, with great deference for the opinion of the chief judge, it seems to me, that unless the right of property in the soil, to the middle of the stream, vested in them under and in virtue of their respective deeds, there is no other ground on which they, or those claiming under them, can be entitled to it; for if it did not pass from *Charles Carroll*, by his deed, the right of property still remained in him. And if an island had arisen in the river, it would have belonged to him; or if the bed of the river had been left bare, by a sudden recess of the water, as the *ius publicum* would thereby necessarily have been destroyed, the relicted land would have remained his, and would not have appertained to those who held the adjoining lands on either side. And upon the same principle, *eo instanti* that the stream was diverted from its original course in the year 1786, by digging the canal, the soil of the uncovered bed, the right of property of which he had never parted from, would have been thrown upon him, unaffected by a public right, the usufruct having ceased, and no subsequent filling up, or other change in the surface of the *locus in quo*, by natural and artificial means, or either, could have the effect to deprive him of his right of property in the soil. I think, therefore, that the law in relation to the right of alluvion is not applicable to the facts in this case, and that *Lyon* and *Lawson* were either entitled to the relicted soil, when the water was first diverted, or not at all.

By the common law, the proprietors of estates bounded by rivers not navigable, or, as they are often called, private rivers, not only have the right of fishing, but the property in the soil itself, *ad filum medium aquæ*; *Harg. Law Tracts*, 5. 5 *Bac. Ab. tit. Prerogative*, 494; because, as it is said, they are presumed to have been distributed out, and appropriated as other lands. And sometimes by prescription, it is the same as to public rivers, as in the case of the river *Severn*. This is a rule of property in *England*, and I hold it to be equally the law of this state.

It seems to be admitted, that as the lands conveyed by *Carroll* to *William Lyon* and *Alexander Lawson*, are described in the deeds as bounding upon *Jones's Falls*, if that had been a private river, they would have been entitled to hold to the middle of the stream; and, if I am right in supposing that the property in the soil was *Carroll's*, subject

Brown
vs
Kennedy

JUNE 1821.

JUNE 1821.

Browne
vs
Kennedy

only to the common user, I cannot perceive why *Jones's Falls*, when the *bed* had become private property, should not be subject, *sub modo*, to the same rules (as to the *right to the soil*,) that prevail in relation to private rivers, which are private property. In many respects the same rules do prevail. If one has an estate, through which a private river runs, and an island should arise in the river, it will belong to him; so, if he has the property in the soil of a public river, and an island springs up, it will equally belong to him. Again, if in the case of a private river, the bed is left bare by a sudden recess of the water, the relict land remains the property of the former owner; and so, if one had the property in the soil of a public river, and the bed is left bare by a sudden recess of the water, the relict land will remain his; because in each case the property in the soil is in him. And for the same reason all islands, relict land, and other increase arising in navigable rivers, belong, in *England*, to the King, here to the State, where the property in the soil has not been appropriated; but where it has become private property, either by grant or prescription, the same rules do or should apply to it that govern other private property of the same nature. It is subject to the same law of descents, and liable to be transferred by the same mode and form of conveyance, and is subject to none of the rules applicable to lands not granted or distributed out. If therefore, where a man having an estate through which a private river runs, conveys away his land lying on one side of the stream, and describes it as bounding on the river, the purchaser will, by operation of law, hold to the middle, it would seem, by parity of reason, that if the same man, having an estate through which a public river runs, the soil of the bed of which makes a part of his estate, as in the case of a private river, conveys away the land lying on one side, and makes the river the boundary, the purchaser would, by the same operation of law, be entitled to hold, in respect of the right of soil, to the middle of the stream. For why in one case more than the other, should the purchaser be restricted to the margin of the stream, the river acting equally as a boundary in both cases, &c. and the public easement being in no manner disturbed. In both cases the soil is the private property of the seller, and the same reason applies as well to one as the other, whether he acquir-

JUNE 1821

Browne
vs
Kennedy

ed his title by grant, or holds it under the fiction that it was originally distributed out to him. And if in the latter case, the purchaser would not be entitled to hold in respect of the soil to the middle of the river, neither should he be in the former. But the cases put may be more nearly assimilated, by supposing that in the case of the private river, the exclusive right of fishing had been before granted to another, so that the seller would have nothing but the property in the soil in either, subject to an exclusive right of fishing in the one case, in another, and to a common of fishery in the other case. On what principle it is, that the riparian proprietors are held to have the property in the soil, to the middle of a private river, is not material. Whether the law assigns it as a specific limitation to their respective ownerships, because that streams, being in their nature unstable, the limits of estates depending upon them would, if confined to the margins, be unsettled; or that the river acts as a boundary between them, and that, therefore, they are carried to the ideal line that is supposed equally to divide the stream. But admit the rule, and it applies with equal reason and policy to public or navigable rivers, the beds of which have been granted out and become private property. For it cannot be imagined, that the seller when he uses the same words of description, intends in the one case more than the other, to restrict the purchaser to the margin of the stream. All the lands in this state have not been distributed or granted out to the citizens as they are supposed to have been in *England*; but unnavigable rivers, and lands not patented, are as much the property of the state, as public rivers in *England* are the property of the King. And if the state grants a tract of land, bounding on an unnavigable river, I hold the rule before alluded to, to apply, and that the grantee will be entitled to the soil to the middle of the stream. And applying the same rule to this case, I think that *Alexander Lawson*, under his deed from *Charles Carroll*, was entitled to hold to the middle of *Jones's Falls*, and agree with the chief judge that the appellant is entitled to recover the land which forms the subject of this suit.

JOHNSON and MARTIN, J. concurred in this opinion.

EARLE, J. By the agreement of the parties, the statement of facts in this case has undergone a considerable al-

JUNE 1821.

Browne
vs
Kennedy

teration since it was argued. As it is now understood by me, there is no question of alluvion to be decided by this court, there having been a complete diversion of the waters of the *Falls* by the cutting of the canal in the year 1786, which laid the bed of the river as effectually bare as if its waters had been suddenly withdrawn by natural means. The point then is, to whom did the soil of the river belong at the time of the desertion of its waters; or which is the same thing, did the soil of the river pass by the deed of 1787 from *Carroll* to *Lyon*, and from *Carroll* to *Lawson*, which it is admitted did not in express terms comprise it within their lines? The *Falls* is conceded to have been a navigable river, and the position is not now to be disputed, that it was granted by the Lord Proprietary to *Todd*, under whom *Carroll* claimed as a part of *Todd's Range*, subject nevertheless to a right common to all persons to navigate and fish its waters.

It may be considered a settled rule of the common law, that private rivers, wherein the tide does not ebb and flow, and which are not navigable, belong to the owners of the adjoining lands on each side, who, as a consequence of the ownership of the soil, have the exclusive right of fishing therein, *ad filum medium aque*. This principle proceeds on the ground of a legal fiction, that all the property of the Kingdom was originally in the King as universal occupant, and that the soil of such rivers has been distributed out by him among his subjects. 5 *Bac. Ab.* 495. It is a principle based on the soundest policy. Its purpose is to assign a particular proprietor to every thing capable of ownership, leaving as little as may be in common, to be the source of contention and strife. 2 *Blk. Com.* 261. It is the common law effect of a grant of land thus situated; that is to say, land adjoining to private rivers, from one individual to another, to carry with it this right of soil and fishing; and to its complete transfer, a particular description is not necessary, nor even the mention of the right. Like other common law rights, it is, however, liable to be controlled by special custom or grant. *Harg. Law Tracts*, s. 5. The soil of the bed of a private river may belong to one person, and the adjoining lands to another; and it is not perceived why they may not exist as separate rights at the same time in the same person; why the owner by special custom of the soil of a private river, may not become the owner of the

adjacent lands, without his special right becoming extinct, and merging in the riparian right? The utmost diligence of research has not discovered to me a single case in which such separate rights have become thus united.

Browne
vs.
Kennedy

How far this common law doctrine in relation to private rivers, is applicable to unnavigable waters, or fresh water streams, in this state, has never been decided by our courts of justice; yet I am not at all disposed at present to question its applicability. Certain it is, that neither in *Great Britain* nor here, can the principle be applied to arms of the sea, or navigable rivers, in which the tide flows and re-flows, and in which a right exists of fishing and navigating common to all, so long as the King, or the public, have a property in those rivers. *De communi jure*, the right of navigable rivers, and arms of the sea, belongs to the King, and he hath the property in the soil thereof, having never distributed them out to his subjects, and his subjects can never have any claim thereon except by alluvion; and as to waters of this description in this state, the Lord Proprietary is to be considered, under the charter of *Maryland*, to have been in the place of the King. This right of property in navigable rivers, and arms of the sea, exists in the King, and existed here in the Lord Proprietary, without any reference to the ownership of the adjoining lands; and no person can doubt, that a grant by the one, or the other, of lands bordering on navigable rivers, would not have had the effect to carry with it any part of the soil covered by its waters—And the reason is plain; because the common law principle, of which I have been speaking, has no application to rivers that are navigable, and such as of common right, as easements, belong to all; and because such operation of the grant would have been in derogation of two known rules of the common law, which are, that the soil of a public or navigable river can never be presumed to be in a private person; and the King can never grant a part of his seas without positive and appropriate expressions to pass the right.

If the Lord Proprietary had then granted to *Todd* the tract called *Todd's Runge*, describing a part of it to lay on the north side of the *Falls*, and part of it on the south side of that water, and binding the same on the margin on each side, the bed of the river would not have been conveyed to him by the grant, it not being a private river, and the rule

JUNE 1821. of the common law, so often mentioned, not applying to the subject. Had this been the manner of the grant, the soil of the river would have been retained by the Proprietary, and in 1786, when it was forsaken by its waters, the *Falls* would have been the property of the public. But the patent of *Todd's Range* was not so worded, and was made to include within its lines the bed of the river, as well as the land on its banks, and the grantee took the same in virtue of the concessions of the grant, and so holding the right, transmitted it to *Carroll*. What then was *Carroll's* rights in 1757, when he conveyed to *Lyon* and *Lawson*? For such as were then attached to the land conveyed, he transferred to them, and he could transfer none other. He occupied exactly the place of the Lord Proprietary, before he granted to *Todd*; and if the Proprietary would have retained the bed of the river by limiting the lines of the grant to run with its margin on each side, which I have before endeavoured to demonstrate, the deeds in question have precisely the same operation, and consequently the soil of the river was not passed away by *Carroll* in the year 1757. His right to the bed of this navigable river was derived to him by grant, and not being a right derived to him from his ownership of the adjoining lands, which is admitted, where it applies, to be a substantial rule of property, it could not have been the common law effect of his deeds, to transfer the soil of the river covered with water, by conveying away the adjoining lands on each side of it. Having no riparian right to the bed of the river, he could not impliedly convey such to *Lyon* and *Lawson*, and in consequence the soil of the river appears to me to have been retained by him, and to have been as much his, as, if subsequently to the year 1757, he had obtained his first grant of it from the Proprietary. In my judgment *Carroll* had the same right, after the deeds of 1757, to the soil of the river, as he would have had to the middle tract of three adjoining tracts of land, after he had conveyed away the tract on each side of it, binding the lines of the conveyances on the middle tract. The argument urged by the appellant's counsel, that the soil of the river passed as an appertenant to the lands conveyed by the deeds, has no weight with me. I cannot think, that the grant in fee of one soil, can carry with it, as a mere appertenant, an estate of inheritance in another soil adjoining to it.

Browne
vs
Kennedy

Such are the views I have taken of this subject, and so JUNE 1821. strongly am I impressed with the propriety of them, that I cannot concur in the opinion of the court pronounced in this case. It appears to me the appellant has no title to the land for which he has prosecuted this ejectment in the court below, and therefore I think that the judgment of the subordinate tribunal ought to be affirmed.

Hepburn
vs
Sewell

JUDGMENT REVERSED, &c.

COURT OF APPEALS, JUNE TERM, 1821.

HEPBURN, Adm'r, of FISHWICK, vs. SEWELL.

APPEAL from *Prince-George's* county court. *Trover* for several negro slaves, brought by the appellant against the appellee. The facts are sufficiently stated in the opinion of this court. The court below, [*Johnson*, Ch. J. and *Key*, A. J.] were of opinion against the plaintiff, and the verdict and judgment being against him, he appealed to this court.

If the damages, recovered by a judgment in an action of *trover* for the conversion of personal property, be paid by the defendant, and such property was not delivered back to the plaintiff, and accepted by him prior to such action, the right to it becomes vested in the defendant, and his title has relation back to the time of the conversion.

The cause was argued before BUCHANAN, EARLE, and Dorsey, J.

R. Johnson, for the appellant, cited 6 *Rac. Ab. tit. Trover*, (A.) 679, 690. 1 *Chitty's Plead.* 192, 489, 531, 633; and *Le Bret vs. Papillon*, 4 *East*, 502.

Harper, *Magruder* and *J. Johnson, Jr.* for the appellee, relied on 1 *Com. Dig. tit. Trover*, 319, and 2 *Esp. Dig.* 208.

If the property increases in value between the conversion and the satisfaction of the judgment, the defendant is entitled to the benefit of such increase; if it diminishes in value, he bears the loss.

DORSEY, J. delivered the opinion of the court. The appellant in this cause, as administrator of *Jane Fishwick*, instituted an action of *trover* in *Prince-George's* county court, to September term 1812, against the appellee, to recover the value of certain negroes, among whom were *Sull*, *Patt* and *Phillis*, the property of the appellant's intestate, and obtained a verdict for the sum of \$7155 50, on which judgment was rendered. The appellee appealed from that judgment to the court of appeals, and the same was affirmed at June term 1818, and the amount of the judgment, with costs, was paid by the appellant to the appellee, before the trial, but after the issue was joined in the present suit. After the commencement of the action of *trover*, in which the verdict was rendered, the slaves *Sull*, *Patt* and *Phillis*, each had a child, and the present action of *trover*

JUNE 1821.

Hepburn
vs
Sewell

was instituted by the appellant to recover the value of the said children. The court below decided that the action could not be maintained, and this court concur in that decision. The *British* authorities lay down the general proposition, that if the plaintiff in an action of trover has recovered damages for the conversion of the goods, the property thereof vests in the defendant, who, as damages to the value have been recovered against him, is to be considered as a purchaser. *Adams vs. Broughton*, 2 *Strange*, 1078. 6 *Bacon's Abridgment*, title *Trover*, letter A, page 679. This court are of an opinion, that the judgment *per se* doth not clothe the defendant with the legal character of a purchaser, but that the judgment, and its fruit, to wit, the payment of the amount thereof, must both concur, to vest the right of property in the defendant. But the question occurs, to what epoch shall the title of the defendant relate on his satisfying the amount of the judgment? and we think his title relates back to the time of conversion. If the thing converted should, from any cause whether natural or artificial, be destroyed during the interval intervening between the period of conversion, and the payment of the judgment, the loss must be sustained by the defendant; and it would seem to follow, that if the thing should improve in value during that period, the benefit ought to enure to the defendant, on the principle *qui sentit onus, sentire debet et commodum*. It must be borne in mind that the plaintiff in an action of trover compels the defendant to become a purchaser against his will; and from what period does he elect to consider the defendant as a purchaser or as answerable to him for the value of the thing converted? He selects the date of conversion as the epoch of the defendant's responsibility, and claims from him the value of the property at that period, with interest to the time of taking the verdict. The inchoate right of the defendant, as a purchaser, must therefore be considered as coeval with the period of conversion, and this right being consummated by the judgment and its discharge, must, on legal and equitable principles, relate back to its commencement. The generality of our expressions must not be misunderstood; we do not mean to decide that in all cases of trover the payment of the damages assessed vests the right of property in the defendant. Thus, if property converted is returned and received by the owner before the institution, of an

action of trover, as damages could only be given for a partial conversion, the payment thereof would not divest the right of property out of the plaintiff, and vest it in the defendant.

JUNE 1821.
Eichelberger
vs
McCauley

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1821.

EICHELBERGER vs. M'CAGLEY.

APPEAL from *Washington* county court. *Assumpsit* to recover damages for the violation of a contract of the defendant, to deliver a quantity of wheat to the plaintiff at a particular day. The facts are fully stated in the court's opinion. The opinion of the court below, (*Buchanan*, Ch. J. and *T. Buchanan*, A. J.) was against the plaintiff, and the verdict and judgment being also against him, he prosecuted the present appeal. The case of *Bryan vs. M'Eldery*, involving the same question as the present case, was also pending in this court at the present term, on an appeal from *Prince-George's* county court. In this last case the court below, (*Johnson*, Ch. J.) gave an opinion in favour of the plaintiff there, (the appellee here,) and the verdict and judgment being for him, the defendant appealed.

Executory contracts are generally void under the statute of Frauds and Perjuries, where the requisites of that statute are not complied with.

A contract to deliver wheat at a future period, which wheat at the time of the contract is unthrested, is not within this statute.

The doctrine that contracts for the sale of goods, for the delivery of which work and labour is necessary, are not within this statute is not to be extended to cases where the work and labour to be done may be, of themselves, considered parts of such contracts.

The present case was argued in this court at June term last, before EARLE, JOHNSON, and DORSEY, J.

R. Johnson, and *Schley*, for the appellant, referred to the Statute of Frauds, 29 Car. II, ch. 5, s. 17. *Towers vs. Osborne*, 1 Stra. 506. *Clayton vs. Andrews*, 4 Burr. 2101. *Rondeau vs. Wyatt*, 2 H. Blk. 63. *Alexander vs. Combes*, 1 H. Blk. 20. *Cooper vs. Elston*, 7 T. R. 14. 1 Com. on Cont. 93. *Rob. on Frauds*, III, 172, 173. *Egerton vs. Matthews*, 6 East, 303, (note,) and *Groves vs. Buck*, 3 Maule & Selw. 179.

Taney, and *Magruder*, for the appellee, cited *Davis & Buckley vs. Harding*, in this court at June term 1816, and *Newman vs. Morris*, 4 Harr. & M'Hen. 421.

Curia. Adv. Vult.

At this term the opinion of the court was delivered by

JUNE 1821.

Eichelberger
vs
M'Cauley

EARLE, J. The facts of this case appear as follows: On the 14th of November 1816, *M'Cauley* entered into a verbal contract with *Eichelberger*, to deliver to him 800 bushels of wheat, which was then *unthreshed and in the straw*, and so understood between the parties, by or before the Christmas following, if the weather would admit of the said wheat being got out by that time, for which *Eichelberger* was to pay at the rate and price of one dollar and sixty-five cents per bushel on the delivery, and give *M'Cauley* the offal thereof. The weather did admit of the wheat being threshed out by or before Christmas, but *M'Cauley* neglected to deliver the same or any part thereof. Such being the facts in the case, and it being admitted that *Eichelberger* accepted no part of the grain so sold, nor actually received the same, nor gave any thing in earnest to bind the bargain, or in part payment, and that no note or memorandum in writing was signed by the parties, or their agents thereto lawfully authorised, the court below was called upon to decide, whether this was a case within the operation of the statute of frauds and perjuries, and having expressed an opinion to that effect, it has become the duty of this court to revise the opinion, and correct it if erroneous.

Since the adjudication of *Rondeau and Wyatt* by Lord *Loughborough* in the year 1792, it has been considered established law that verbal executory contracts for the sale of goods, wares and merchandises, where no part of the goods sold has been accepted or received by the buyer, nor any thing has been given by him in earnest to bind the bargain, or in part payment, and where no note or memorandum of the bargain has been signed by the parties, or their agents thereto lawfully authorised, are within the operation of the statute and are void. The contract here being of this character, to be performed at a future time, and in its nature executory, is avoided by the statute, unless there are circumstances in it to distinguish it from ordinary executory contracts. It is alleged there are such circumstances, and that the wheat being unthreshed and in the straw at the time of the bargain, and work and labour being necessary to prepare it for delivery, it is not a sale of goods, wares and merchandise, within the meaning of the *seventeenth* section of this statute.

Whatever opinion may be entertained of the true meaning of the *seventeenth* section of the statute, the court think

The distinction between mere contracts of sale of goods, JUNE 1821. and those contracts for the sale of goods where work and labour is to be bestowed on them previous to delivery, and subjects are blended together, some of which are not in the contemplation of the statute, has too long prevailed to be at this day questioned. It is enforced by Lord *Loughborough* in the before mentioned case of *Rondeau and Wyatt*, and has since been acted on by several most respectable judges. The case of *Clayton against Andrews*, decided by Lord *Mansfield* in 1767, a case in all its circumstances exactly parallel with the present, has been used as an authority upon this distinction. It is said to be a case without the statute, because work is to be done in threshing out the wheat, which makes a part of the contract, and is different from a mere contract of sale, to which kind of contract alone the statute is applicable. It is not known whether this distinction has been expressly recognised by any of the adjudications of the courts of justice in this state, but the case of *Rondeau vs. Wyatt*, which insists on the doctrine, has been acknowledged as authority in the late General Court, in the case quoted on the argument of *Newman vs. Morris*, 4 *Harris and M. Henry*, 421. It was a contract for the delivery of cheese at a future time, and on the authority of *Rondeau and Wyatt*, it was determined to be an executory contract, and void under the statute. The distinction thus recognised, the court do not intend shall be pushed farther than the circumstances of the case of *Clayton and Andrews* will justify, and they must not therefore be understood to extend it to cases where the articles sold are not to be prepared for delivery by work and labour, and where the work and labour may not be considered in some measure a part of the contract. Thus understood, the court reverse the decision of the court below, and order a *procedendo*.

Eichelberger
vs
M^cCauley

CHASE, Ch. J. and MARTIN, J. were absent at the argument, but they concurred in the opinion of the court.

JUDGMENT REVERSED. (a).

In the case of *Brian vs. M. Eldery*

JUDGMENT AFFIRMED.

(a) See *Garbutt vs. Watson*, 5 *Barn. & Ald.* 613.

JUNE 1821.

COURT OF APPEALS, JUNE TERM, 1821.

Yates
vs

Hollingsworth

YATES'S ADM'RS. VS. HOLLINGSWORTH.

A promise by a debtor, after his discharge under a bankrupt law, to pay a prior debt, waives the discharge, and the debt is a sufficient consideration for the promise.

The promise must however be express, and if a condition be annexed to it, the condition must be complied with.

APPEAL from *Baltimore* county court. It was an action of *assumpsit*, brought by the appellee against the appellants. A verdict was taken for the plaintiff, subject to the opinion of the court, on the following facts, viz. The plaintiff in July 1803, lent to *Yates*, the defendant's intestate, \$1000, and *Yates*, soon after, in the course of the same year, became bankrupt, and was discharged under the statute of bankruptcy of the *United States*, and in pursuance of that statute, transferred his property to assignees regularly appointed according to its provisions. No dividend was ever made by said assignees among the creditors of *Yates*. Some time in the year 1815, *Yates* entered into partnership, as an auctioneer, with *Hull Harrison*, and the plaintiff became indebted to *Yates* and *Harrison* in the sum of \$28 15, for commissions on sales at auction; and when the plaintiff was called upon for payment of said debt, he replied, he supposed *Yates* would have charged himself with it, in part payment of the aforesaid money lent by him to *Yates*, and that he would call on *Yates* on the subject. The plaintiff did soon after call, and told *Yates* he was surprised he had not settled the above debt of \$28 15, by charging himself with it; *Yates* replied, that the plaintiff's claim on him had nothing to do with the business of himself and *Harrison*. The plaintiff, however, persisted in his claim, and urged his debt against *Yates* as a debt of honour, it being for money lent from motives of friendship merely, and ought to be paid. *Yates* replied, that he had transferred property to his assignees sufficient to pay this and his other debts. The plaintiff insisted that his debt ought not to be put on that footing, that it ought to be paid by *Yates*, and that he would not battle it with his assignees. He also observed, that he expected, in consequence of the dissolution of the copartnership between *Thomas* and *Samuel Hollingsworth*, they would have a good deal of business for an auctioneer, and that he had always employed him, *Yates*, as an auctioneer, and was desirous still to do so, but that he should not do so unless *Yates* would consent that the commissions should be applied in payment of this debt. *Yates* said, he thought it hard that his services should be thus applied, when he had assigned sufficient property for the payment of all his debts.

The plaintiff replied he had nothing to do with that, that JUNE 1821.
 his debt did not originate in the course of business, but was
 merely a loan to accommodate *Yates*, who then said that
 his partner's half of the commissions alluded to must be
 paid, but that his own half should be applied to the pay-
 ment of the debt he owed the plaintiff; and at the same
 time directed the above sum of \$28 15, due from the plain-
 tiff to him and *Harrison*, to be charged to himself, and ap-
 plied in part to the discharge of the plaintiff's debt, which
 was accordingly done at the time, to wit, in July 1815.

Yates
 vs
 Hollingsworth

On these facts the county court gave judgment for the plaintiff, and the defendants appealed to this court.

The case was argued before BUCHANAN, EARLE, JOHN-
 SON, MARTIN, and DORSEY, J.

Pinkney, and *Williams*, (Assistant Attorney-General,) relied on the *thirty-fourth* section of the "Act to establish an uniform system of bankruptcy throughout the *United States*." (3 Vol. of the Laws of the U. States, 332.) *Cole vs. Saxby*, 3 Esp. Rep. 159. *Lynbry vs. Weightman*, 5 Esp. Rep. 198. *Besford vs. Saunders*, 2 H. Blk. Rep. 116. *Scouton vs. Eislord*, 7 Johns. Rep. 36. *Davies vs. Smith*, 4 Esp. Rep. 36. *Clementson vs. Williams*, 8 Cranch, 72. *Thrupp vs. Fielder*, 2 Esp. Rep. 628. 1 Com. on Cont. 163. *Rowcroft vs. Lomas*; and 4 Maule & Selw. 457.

Winder, for the appellee.

EARLE, J. delivered the opinion of the court. A promise to pay after bankruptcy, waives the discharge, and the prior debt is a sufficient consideration for the new promise. But the new promise thus made, to charge the party, must be an express promise, and must be absolute and unconditional. If there is any thing like a condition in the promise, it must be removed by testimony, and placed on the footing of an absolute undertaking, to entitle the plaintiff to a recovery. As if the bankrupt should say, that he would pay when he was able, the plaintiff must shew an ability to pay.

Taking these principles of law for our guide, the court are of opinion, that the promise imputed to the appellant's intestate, the bankrupt in this case, was substantially nothing more than a conditional assumpsit, and no steps having been taken to place it upon the footing of an absolute

JUNE 1821. engagement, the court think the judgment of the county court ought to be reversed.

Culver
vs.
Shriner.

Yates being much urged said, that his partner's half of commissions to become due from the appellee for proceeds received at auction, must be paid to him, but that his own half should be applied to the payment of the old debt, and he directed a small balance, then due from the appellee to the partners, to be charged to himself, which was accordingly done. But the application of *Yates's* half of the commissions to the payment of the former debt due by him to *Hollingsworth*, was to be made upon the condition that *Hollingsworth* furnished the partners with auction business, which it does not appear he did furnish. Had commissions arose and become due from *Hollingsworth*, to the extent of the former debt, *Yates* would have been obliged, by his promise, to have applied them, and if he had refused or neglected so to do, the appellee would have had his remedy.

The judgment must be reversed.

JUDGMENT REVERSED.

COURT OF APPEALS, JUNE TERM, 1821.

CULVER, EX'R. of KEMP vs. SHRINER.

Articles of agreement between K and S, in which K agrees to convey certain lands to S, in consideration that S would pay to K, or order, £600, and provide for the support of K and wife, during their lives, K to live on the lands and keep there two slaves, and that the future issue of such slaves should belong to S and his heirs, is a covenant and not a grant, and does not give S property in such issue.

APPEAL from *Montgomery* county court. Replevin for two slaves. The appellee was the plaintiff below. The defendant, (the appellant,) pleaded—1. *Non cepit*, 2. Property in himself as executor of *Kemp*; and 3. Property in a stranger. The court below, (*Ridgely, A. J.*) directed the jury, that the plaintiff was entitled to recover, and on this direction he obtained a verdict and judgment. The defendant appealed to this court. The facts sufficiently appear in the court's opinion. The case was argued at June term last, before BUCHANAN, EARLE, JOHNSON, and DORSEY, J.

Stephen, for the appellant, relied on *Jackson vs. Myers*, 3 *Johns. Rep.* 388. *Jones vs. Barkley*, 2 *Dougl.* 684, 689, 690. 2 *Pow. on Cont.* 2, 32, 40. 2 *Johns. Rep.* 207. *Campbell vs. Jones*, 6 *T. R.* 570. *Glazebrook vs. Woodrow*, 8 *T. R.* 370. *Goodison vs. Nunn*, 4 *T. R.* 761. 2 *Bac. Ab. tit. Covenant*, (L,) 92, 93. *The Duke of St. Al-*

bans vs. Shore, 1 H. Blk. 270, 279; and *Callonel vs. June* 1821. *Briggs*, 1 Salk. 113.

Culver
vs
Shriner

Taney and Schley, for the appellee, cited 3 Bac. Ab. tit. *Grant*, (F,) *Ibid.* (D,) §84, *Grantham v. Hawley*, *Hobert*, 132; and *Negro Jack vs. Hopewell*, decided in the court of appeals at May term 1784.

Curia Adv. Vult.

At this term the opinion of the court was delivered by

JOHNSON, J. The present is an appeal from *Montgomery* county court, in which the appellee, (the plaintiff below,) obtained a judgment.

It was an action of replevin, brought to recover two negroes from *Henry Culver*, who, as the executor of *Kemp*, was in the possession of them; and whether that action was sustainable, depends on the true construction of certain articles of agreement entered into between *Peter Kemp* (the defendant's testator,) and *Shriner*, the plaintiff below.

By the articles of agreement, bearing date the 4th February 1792, *Kemp*, who was seized in fee of a tract of land called *Kemp's Luck*, containing 164 acres, on which was a valuable grist mill, and another tract called *Strife's Purchase*, containing 156 acres, in the whole 320 acres, being indebted to sundry persons to the amount of £600, and growing old and infirm, and having brought up from her infancy *Eve* the wife of *Shriner*, and being desirous to provide for her and her children, and to rid himself from debt, agreed to sell and convey the lands and mill to *Shriner* in fee, as soon as *Shriner* paid to *Kemp*, or his order, £600. An additional consideration for this conveyance mentioned in the said agreement was, that *Shriner* should find and provide for *Kemp*, and his wife, and the longest liver of them, according to the following provisions and agreements: *Kemp* and wife, and the survivor, to live in the upper story of the dwelling-house during life, to have the use of one third part of the garden, and to be supplied with necessary fire-wood, *Shriner* to pay *Kemp* £50 annually, and to find him and wife 300 weight of good pork, 152 of beef, 6 barrels of flour, 3 of Indian corn, &c. *Kemp* was also to keep two negroes on the place, one named *Tom*, the other *Nancy*; and *Kemp* also agreed, that all the increase of said

JUNE 1821. *Nancy*, should she have children, should belong to said *Shriner* and his heirs.

Culver
vs
Shriner

In the same agreement, *Kemp* covenants to convey the lands mentioned in said agreement, and *Shriner* to comply with the stipulations the agreement imposed on him. And for the true performance of each and every of the articles, covenants and agreements, entered into by each party, each bound himself to the other in the penalty of £5000.

The suit was brought to recover from the possession of *Culver*, the executor of *Kemp*, the issue of *Nancy*, born subsequent to the date of the above agreement.

The defendant, at the trial of the cause, prayed the court, that the covenant in relation to the increase of *Nancy*, relating to things not in *esse*, did not pass to *Shriner* any right of property, and that therefore the plaintiff was not entitled to recover. This opinion the court refused to give, and gave an opinion that the plaintiff *was entitled to recover*.

From that opinion the present appeal is made. From every part of the articles entered into between the parties, it is most evident, that each relied on the instrument of writing to compel a compliance with their respective stipulations. The one could force, or supposed he could force, a conveyance of the land on the payment of the stipulated sum; the other that he could compel the payment of the money for the land in case of refusal to pay; and *Kemp* thought he could resort to an action on the case for damages, in case any or every of the stipulations on the part of *Shriner* were not complied with. There can be no doubt that such was the obvious meaning of the parties, and that the agreement was expressed in appropriate terms to carry that meaning into effect as to every part of the instrument, except so far as relates to the claim respecting the two negroes now in dispute. For a violation, on the part of either, of any other part of the agreement, the remedy at law was either an action of debt for the penalty, or covenant. This is most clear and evident; and no satisfactory reason has been given why, for such violation, a different remedy exists.

The opinion of the court below can only be sustained on the principle, that *instantly* on the *execution* of the articles, the issue that *Nancy* might have, *potentially* passed to *Shriner*, no matter whether an individual act was subsequ-

quently done by either of them; that such issue must be the property of *Shriner*, no matter where or under what circumstances it might have been born. One would suppose that a clause of such import would not have been inserted in an agreement so cautiously expressed to insure the mutual interest of the parties.

JUNE 1821.

Culver
vs
Shriner

It is evident to a majority of the court, that such was not the intention, but that the right to claim the negroes depended on the fulfilment of the engagements by *Shriner*.

Let us suppose *Shriner* never did pay the money, and that *Kemp* remained in his original possession—nay further, that he did not and could not pay the money, and that he released himself from his engagement under the insolvent laws—would the negroes belong to him or his trustee? Surely not. Let us suppose he did pay, and that *Kemp* and his wife took their station in the house, and that *Shriner* then refused to furnish the articles, and to permit them to keep *Nancy* on the place, and the issue was born off the land, could it be contended the issue belonged to *Shriner*? And yet to this extent must the articles be extended to sustain the opinion of the court below; for, from the bill of exceptions, not an individual act stipulated to be done, appears to have taken place; from any thing before the court, the transaction rested on the mere execution of the instrument.

The clause in the instrument respecting the negroes is, “*Kemp is to keep*”—that is, (in connexion with the prior and subsequent parts of the articles,) *agrees to keep*. Again—“*Kemp doth hereby agree that the issue (if any,) shall belong*”—that is, shall, (other agreements having all been fulfilled,) become the *property of Shriner*; and such acts shall be done, as will make them his property.

But in support of the decision it has been contended, that as the unborn issue of female slaves can pass over by *grant*, and as the words in the articles are sufficiently extensive to operate as a grant, although potentially only, yet on the birth of the issue, the complete property was in *Shriner*.

It appears to a majority of the court, that that was never designed to be its effect by the parties, and that it ought not to have that operation, unless the court are compelled to say they passed as granted, and were not comprehended in the respective covenants.

JUNE 1821. The only case relied on as shewing that the property passed, is *Grantham vs. Hawley, Hobert*, 132. That case was this:—One *Sutton* being seized of land, leased it for 21 years to *Richard Sankee* by indenture, and did covenant, grant to and with *Sankee*, his executors and assigns, that it should be lawful for him to take and carry away to his own use such corn as should be growing on the ground at the end of the term. The lessor, *Sutton*, then conveyed the reversion to the plaintiff, *Grantham*. The executor of the lessee, after the end of the term, took the corn that was growing on the land at the expiration of the term, and sold it to *Hawley*, who gave his bond in the sum of £40, conditioned to pay £20, if the corn of right belonged to the plaintiff. In this case the plaintiff failed; and how was it possible for him to have succeeded? If the lessor, *Sutton*, could not, against his covenant and grant, claim the corn, neither could the person to whom he transferred the reversion, whether the right of the lessee to the corn rested on the covenant or the grant. It would be extraordinary indeed, if when the lessee was by deed expressly authorised to carry away the corn to his use, that the lessor should still have had right to it, merely because it was not carried away during the term.

There might be some analogy between the case in *Hobert*, and the one before the court, if it appeared that the contract had been complied with on the part of *Shriner*, that *Nancy* had been kept on the place, when the children were born, and that *Shriner* had got a possession which *Kemp's* executor sought to disturb. Then, in the language of the judges in that case, it might be said that the "property, and every right" to the issue, passed, for it was "both a covenant and grant." But as such a case is not before the court, the decision in *Hobert* is not an authority in point.

BUCHANAN, J. dissented.

JUDGMENT REVERSED.

COURT OF APPEALS, JUNE TERM, 1821.

JUNE 1821.

BORING'S LESSEE vs. LEMMON.

Boring

vs

Lemmon

APPEAL from *Baltimore* county court. Ejectment for a tract of land called *Boring's Habitation Rock*. The general issue was pleaded, and a verdict taken for the plaintiff, subject to the opinion of the court, on the following statement of facts, viz. "*Boring's Habitation Rock* was granted to *Ezekiel Boring*, the lessor of the plaintiff, the 24th of April 1795. The grant was founded upon a certificate of survey that had been returned into the land office in due and regular time, and dated the 8th day of October 1794. One *Christian Singery* had, under a warrant, caused a survey to be made of a quantity of land in *Baltimore* county, of which a certificate of survey was made out by the surveyor, on or about the 30th of April 1770, under the name of *Singery's Troutng Stream*, which certificate was delivered to *Singery* to be returned to the land office. As the survey was made by the surveyor, and according to his certificate, the quantity of land included in it was 170½ acres, and for this quantity only he made a compensation to the Lord Proprietor; this certificate did not include any part of the lands afterwards included in the tract called *Boring's Habitation Rock*; after the certificate was so delivered by the surveyor to *Singery*, he (*Singery*) fraudulently caused the courses and distances, or description of the land, in such certificate, so to be altered, (by inserting a call for the beginning of *Petticout's Loose*,) as to make it embrace the whole of the lands afterwards included in *Boring's Habitation Rock*, and he caused the certificate, so altered, to be returned to the land office; afterwards, on or about the 20th of April 1775, he obtained a patent from the then Lord Proprietor, agreeably to the certificate, as altered, the Lord Proprietor and his officers being ignorant of the alteration. *Boring*, after having obtained his patent, brought an ejectment against *Singery*, (who was in possession,) in the late general court, to October term 1795, and at October term 1799 recovered a verdict and judgment for the whole tract called *Boring's Habitation Rock*; from this judgment *Singery* appealed to the court of appeals, where it was reversed at November term 1802, and the case sent back by writ of *procedendo* to the general court. (See 4 *Horr. & M'Hen.* 398.) Upon the second

A patent fraudulently obtained is void, and if one afterwards issues for the same land, the legal estate becomes vested in the second patentee. A deed from a sheriff to a vendee, at a sale under a *fi. fa.* is not necessary to pass the legal estate, but the same becomes vested in the vendee by operation of law.

JUNE 1821. trial in the general court at October term 1805, *Singery* obtained a verdict and judgment against *Boring*. While this ejectment was depending in the general court, under the writ of *procedendo*, and about the 19th day of November 1799, *Boring* filed a bill in the court of chancery, [in the name of The *Attorney General*, at his relation, against *Singery*,] alleging that *Singery* had fraudulently altered his certificate of *Singery's Troutling Streams*, and had, upon that fraudulent alteration, obtained a patent which embraced the land included in *Boring's Habitation Rock* which the original and lawful certificate would not have included, and prayed for relief. While this suit in chancery was depending, the verdict and judgment in favour of *Singery*, as before mentioned, were had, and on that judgment *Singery* issued a *fieri facias* the 22d November 1805, for the costs. The *fieri facias* was levied by the sheriff of *Baltimore* county on the land included in *Boring's Habitation Rock*, under the name of *Habitation Rock*; and the sheriff regularly sold said land at public sale on the 2d of January 1806, to *Thomas Lemmon*, the defendant in this cause, for \$174 05, which sum *Lemmon* paid to the sheriff, and he paid it over to *Singery*. The sheriff made return of the *fieri facias*, with a schedule thereto annexed, stating that the lands, &c. of *Boring*, had been seized under the *fieri facias*, viz. "One tract of land called *Habitation Rock*, containing 360 acres more or less, situated in north hundred, *Baltimore* county, adjoining the lands of," &c. and valued at fifty cents per acre. He also certified, that said land "was sold at public sale, on the premises, on the 2d of January 1806, to *Thomas Lemmon*, at fifty-one cents per acre." *Lemmon* afterwards, in pursuance of said sale, entered into possession of the lands included in *Boring's Habitation Rock*, and became seized and possessed thereof so far forth as the law authorized under said proceedings, and claims the same as his property. At the time of issuing and levying the *fieri facias* on said land, and selling the same, *Boring* resided in the State of *Pennsylvania*, and knew nothing of said proceedings. The suit in the court of chancery continued depending before that court until the 7th of August 1806, when the chancellor decreed, that the defendant *Singery* should convey to *Boring*, and his heirs, all that part of the land included in the

Boring
vs
Lemmon

patent of *Singery's Troutling Streams*, which was also JUNE 1821, comprehended in the lines of *Boring's Habitation Rock*.

From this decree *Singery* appealed to the court of appeals, where the decree was affirmed at December term, 1809. In pursuance of that decree and affirmance, *Singery* executed, in due and legal form, a deed for said land to *Boring*, on the 15th day of July 1812. The land conveyed by that deed, is so much of the land contained in the patent for *Singery's Troutling Streams*, as was included by the fraudulent alteration of the certificate by *Singery*, and as was also included in the patent for *Boring's Habitation Rock*, and is the land for which this ejectment is brought. On this statement the court below gave judgment for the defendant, and the plaintiff appealed to this court.

Boring
vs
Lemmon

The case was argued before CHASE, Ch. J. BUCHANAN, EARLE, and MARTIN, J.(a.)

Winder, and *B. C. Howard*, for the appellant, relied on *The State vs. Reed*, 4 Harr. & M^cHen. 10. *Spalding vs. Reeder*, 1 Harr. & M^cHen. 189, *D. Dulany's* opinion. *Kelly vs. Greenfield*, 2 Harr. & M^cHen. 141. *Carroll's lessee vs. Llewellyn*, 1 Harr. & M^cHen. 162. *Bates vs. Graves*, 2 Ves. jr. 294; and *Boring's lessee vs. Singery*, 4 Harr. & M^cHen. 398.

R. Johnson, for the appellee, cited *Kilty's Land Hold. Ass.* 421, 452, 453. 3 Blk. Com. 431, 438. 2 Blk. Com. 308. *Bright vs. Eynon*, 1 Burr. 396. 1 Com. on Cont. 36, 37. *Fitzherbert vs. Mather*, 1 T. R. 12. *Hodgson vs. Richardson*, 1 W. Blk. Rep. 465. *Colt et al. vs. Woollaston & Arnold*, 2 P. Wms. 156. *Stent vs. Bailis*, *Ibid* 220. *Broderick vs. Broderick*, 1 P. Wms. 239. *Fermor's case*, 3 Coke, 77. b. *Alton Wood's case*, 1 Coke, 46. a. and *Boring's lessee vs. Singery*, 4 Harr. & M^cHen. 403.

CHASE, Ch. J. delivered the opinion of the court. It being admitted in this case that all the lands contained within the limits of *Boring's Habitation Rock*, were by fraud included in *Singery's Troutling Streams*, by *Singery's* fraudulently inserting in the certificate of *Singery's Troutling Streams*, a call for the beginning of *Petticoats Loose*, while *Singery* had the certificate in his possession, and before the same was returned to the land office; the court

(a) *Johnson*, and *Dorsey*, J. having been counsel for the parties did not sit.

JUNE 1821. are of opinion, that the land thus included in *Singery's Troutng Streams*, did not pass to *Singery* by his patent, but that the same being comprehended within the limits of *Boring's Habitation Rock*, did pass to *Ezekiel Boring*, and that the legal estate vested in him absolutely under the grant for *Boring's Habitation Rock*.

Bowie
vs
O'Neale

The court are also of opinion, that the legal estate in *Boring's Habitation Rock* being vested in *Ezekiel Boring* at the time the *fieri facias* was levied on said land, the same was transferred by the sale of the sheriff to the vendee, *Thomas Lemmon*, by operation of law.

The court are also of opinion, that a deed from the sheriff to the vendee, although frequently taken out of abundant caution as an additional evidence of the vendee's title, is not necessary to vest the legal estate in him.

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1821.

BOWIE vs. O'NEALE, et al. Lessee.

A defendant in ejectment being in possession of the land for which the suit is brought, holding the same by a claim of title adverse to that of the plaintiff for twenty years or more, is not necessarily entitled to a verdict.

The will of a husband does not pass his wife's land, and no possession of the same, by a devisee, under the will, can create a presumption of title.

The evidence given by a deceased witness in a former trial of the same cause, and on the same issue, may be proved in a subsequent trial, but not the legal effect of such evidence.

The depositions of witnesses on the survey, where they are dead, are competent evidence, and the surveyor is a competent witness to prove where such witnesses were sworn on the survey.

APPEAL from *Prince-George's* county court. Ejectment brought in the name of *Lawrence O'Neale's* lessee against *John F. Bowie*, on two demises; one for a tract of land called *Twinn*, or *Trivifer*, or *Twiford*, lying in *Prince-George's* county; and the other for a moiety of the same land. *Lawrence O'Neale* having died, his heirs and widow were made parties, lessors of the plaintiff; and *John F. Bowie* having also died, his devisee was made defendant; defence was taken on warrant, and plots made and returned.

1. At the trial, the plaintiff read in evidence a patent granted to *George Collins*, for the tract of land called *Twiver*, dated the 1st of August 1673, for 440 acres of land, and the will of *George Collins*, dated the 20th of December 1683; in the will no mention was made of the land. He also read the will of *William Selby*, dated the 5th of November 1698, whereby he devised, amongst other property, unto his daughter *Amie Hucker*, the tract of land called *Twiford*, containing 100 acres. Also the will of *Robert Hooker*, dated the 20th of April 1711, devising to his son *Samuel Hooker* 100 acres of land, part of *Twiver*, willed to his wife *Amy Hooker* by her father *William*

Selby. A deed from *Samuel Hooker*, and wife, to *George Pouncey*, dated the 15th of March 1720, for the land called *Twysford*, containing 245 acres. A deed from *George Pouncey* to *Paul Hoyer*, dated the 19th of February 1722, for the land called *Twiford*, containing 440 acres. The will of *Paul Hoyer*, dated the 7th January 1727-8, devising the land called *Twifer* to his eldest son *James Hoyer*. A deed from *Cephas Hoyer* to *Thomas Contee Bowie*, dated the 25th of January 1791, for the land called *Twiver*, containing 112 acres, which had belonged to his father *Dorset Hoyer*. A deed from *Thomas Contee Bowie* to *Lawrence O'Neale*, the original lessor of the plaintiff in this cause, dated the 26th of December 1796, for the last above mentioned land called *Twifer*. Also the plot and explanations returned in the cause, together with the depositions of *Thomas Contee*, *Thomas Earley*, *Joseph Ryan*, *Grace Hoyer*, and *William Sanbury*, all of whom were admitted to be dead. And the depositions of *John McGill*, surveyor of *Prince-George's*, to prove where the said witnesses were sworn, as marked on the plots. He also gave in evidence a copy of the rent rolls for *Prince-George's* county to wit.

Bowie
vs
O'Neale

Acres. yearly rent

440 17 4 *Twiver* surv. 26th May 1678, for *George Collins*, at a bounded white oak near adjoining to the land *Farme*. Possessrs. 30a. *Jos. Harris*. 50a. *Thomas Palmer*. 100a. *Robt. Hooker*. 100 *Wm. Rodery*. 100a. *Robert Bowan*, to be paid by *Jos. Harrison*. 70a. *Wm. Rons*, to be paid by do. *Twiver* surv. 26th May 1678, for *George Collins*, at a bound white oak near adjoining to the land called *Orchard*, in a line of the land called *Farme*. Possessrs. 150—0 6 0 *Robert Hooker's* heirs. 132—0 5 3½ *James Russell*. 100—0 4 0 *Thomas Hodgkin*. 150—0 6 0 *Samel Hyde's* heirs. 100—0 4 0 *Wm. Deacon*. 30—0 1 2½ *Thomas Dorsett*.

[*Alienations.*]

43 1 9 *George Harris*, from *Wm. Austin* & wife, 1 Aug. 1706.
154 6 2 *Jno. Bradford* from *Wm. Austin* & wife, 17 July 1710.
Robt. Bradley from *Jno. Taney Hill*, 15 Nov. 1710.
100 4 0 *Josiah Wilson* from *Wm. Rothery*, 7 Mar. 1710.

JUNE 1821.	180 7 2	Bowie vs O'Neale	<i>Jereh. Sampson</i> from <i>Josiah Wilson</i> , 15 Mar.
			1714.
	180 7 2		<i>Roger Boyce</i> from <i>Jereh. Sampson</i> , 15 Apl.
			1717.
	245 9 10		<i>George Pouncey</i> from <i>Saml. Hooker, et ux.</i>
			15 Mar. 1720.
			<i>Joshua Cecil</i> from <i>Wm. Collins</i> , 29 June 1706.
	28 1 1½		<i>Gunder Errikson</i> from <i>Isaac Cecil</i> , 4 Aug.
			1722.
	337 6 9		<i>Rd. Read</i> from <i>Robt. Hooker</i> , 7 Decr. 1724.
	59 2 4½		<i>Rd. Read</i> from <i>John Bowen</i> , 6 May 1725.
	150 6 0		<i>Saml. Heyde</i> from <i>Jno. Bradford</i> , 11 Feb.
			1733.

Resd. into *Reed's Farm*.

Resd. into part of *Twiford*, folio 105.

Resd. into *Twiford*, folio 111.

Resd. into part of *Twiford*, folio 120.

100 0 4 0 Formerly escheated by *Rd. Read* and *John White*, & called *Read's Pasture*, but never patented; now escheated by *Colmore Beanes* & called *Beanes' Pasture*.

150 0 6 0 *Wm. Mackey* from *Edward Tilghman*, 27 Dec. 1756.

Thos. Contee from *Paul Hoyer*.

35 0 1 5½ Resd. & Escheated into *Harrison's Lot*.—*John Harrison* from *Thos. Contee & Wife*, 20th October 1767.

Also a copy or extract taken from the assessment books of said county for the years 1789, 1790 and 1796, viz.

	Amt.	Assesst.
<i>Hoyer, Cephas</i>	57	10 10½
	Quantity.	Pr. Amt.
<i>Thos. Contee Bowie</i> ,—pt. of <i>Twiver</i>	112	1 1 6 64 8

He also proved, that the patent and deeds above mentioned were correctly located upon the plots. The defendant then read in evidence, a deed from *Robert Hooker* to *Fielder Bowie*, dated the 27th of March 1778, for all his right to a tract or parcel of land, being part of a tract called *Twiver*, containing by patent 440 acres, and patented in the name of *George Collins*, and being the northermost part of said land called *Twiver*, and containing 200 acres more or less; and gave evidence that the same was correctly located upon the plots. He also offered in evidence

a deed from *Robert Hooker* to *Richard Read* dated the 7th JUNE 1821. of December 1724, for all his right to all or any part of a tract of land formerly called *Twiford*, lately resurveyed by *Richard Read*, and called *Reed's Farm*, and containing 337 acres more or less. Also a deed of mortgage from *Fielder Bowie* to *John F. Bowie*, the original defendant in this cause, dated 20th of October 1789, for all the land purchased of *Robert Hooker*; and also offered proof that a decree for the sale of the mortgaged premises in said deed mentioned, having been passed by the court of chancery, *Thomas C. Bowie* was appointed trustee for making said sale, and that the same was sold in pursuance of said decree, and the original defendant in this cause became the purchaser; and that a deed was executed to him by said trustee, dated the 7th of September 1808, for *Reed's Farm*, part of *Twyver*, purchased by said *Fielder Bowie* of *Robert Hooker*. The defendant then prayed the court to instruct the jury, that upon this evidence the plaintiff was not entitled to recover. But the court, [*Key and Plater, A. J.*] refused to give the direction; but were of opinion, and so instructed the jury, that if they should believe from the evidence that the deed from *Robert Hooker* to *Fielder Bowie* was correctly located upon the plots, and that *Fielder Bowie*, and those under whom he claimed the land in question, were in possession thereof, and used and occupied the same by a title or claim of title adverse to that of the plaintiff, for twenty years or upwards before suit brought, that then they ought to find a verdict for the defendant for said land, or so much thereof as they should find to have been so held. The defendant excepted.

2. The plaintiff then, to prove that *Dorsett Hoye* died in possession of the land located by the plaintiff, and during his life possessed and cultivated the same, offered in evidence the depositions, taken on the survey and returned with the plots, of *Thomas Contee*, aged upward of 80 years, *Thomas Early*, *Joseph Ryan*, *Grace Hoye* and *William Sansbury*. All of whom it was admitted were dead. The defendant objected to this evidence, but the court overruled the objection, and permitted the depositions to be read.

The plaintiff then swore *John M. Gill*, the surveyor of the county, to prove where said witnesses were sworn--The de-

Bowie
vs
O'Neale

JUNE 1821. fendant also objected to his testimony; but it was admitted, and the whole of it delivered to the jury.

Bowie
vs
Neale

The defendant then offered to prove by a competent and legal witness, that when a jury was formerly empannelled to try this cause, *Eversfield Bowie* who had been examined on the survey and who is since dead, and who was sworn in court at the time, stated that the land had been in the possession of and cultivated by *Fielder Bowie* for a number of years, and as far as the witness could remember, that he died in the seisin and possession thereof, and that it descended to his son *Allen Bowie*, who also took possession, cultivated it until his death, and died seised of it, and that after his death the same being descended to his infant son, *Thomas C. Bowie*, his guardian entered upon the land, cultivated it for his ward, and continued in the possession of it until it was sold under a decree of the chancery court as before stated. But the court was of opinion that the whole of this last testimony was illegal, and would not suffer any part of it to be offered to the jury. The defendant excepted.

3. The defendant then prayed the court to instruct the jury, that the wills of *William Selby* and *Robert Hooker*, (the latter dated in 1711,) did not pass to the devisees the estates of the wives of the respective testators, and that no possession by the devisees mentioned in said wills, under said wills, of a part of *Twiver*, can create a presumption of title; and that the presumption arising from the possession was rebutted by the wills. But the court refused to give the instruction. The defendant excepted, and the verdict and judgment being against him he prosecuted this appeal.

The cause was argued before BUCHANAN, EARLE and DORSEY, J.(a).

Magruder, for the appellant, cited 1 *Phillip's Evid* 199.

Stephen, for the appellee. Upon the first bill of exceptions cited 1 *Bac. Ab. tit. Baron & Feme*, (J.) 496. *Plummer et al. Lessee vs. Lane et al.* 4 *Harr. & M. Hen.* 72. *Carroll et al. Lessee vs. Norwood*, 4 *Harr. & M. Hen.* 287; and *Lewis's Lessee vs. Waters*, 3 *Harr. & M. Hen.* 430, 433. On the second bill of exceptions he cited 1 *Phillip's Evid.* 174, 199.

(d) *Chase*, Ch J. and *Martin*, J. absent, *Johnson*, J. having been counsel did not sit.

He afterwards admitted that the opinions in the *first* and *JUNE 1821.*
third bills of exceptions were erroneous.

Bowie
 vs
 O'Neale

DORSEY, J. delivered the opinion of the court. The counsel for the appellee having admitted that there was error in the opinions of the court below, as declared in the *first* and *third* bills of exceptions, it is only necessary for the court to decide on the *second*—and we have no doubt, that if a witness who has been examined in the trial of a cause should die, and a new trial should be had in the same cause, and on the same issue, after his death, the testimony which he gave on the first trial may be proved on the second.

The necessity of the case renders the admission of such proof indispensable, and no injustice can result from the adoption of the rule, as the testimony of the deceased witness was not only given under oath, but was given judicially in the trial of the cause between the same parties and on the same issue, and the person to be affected by the testimony enjoyed the invaluable right of cross examination. The rule is accompanied by limitations, which render it subservient to the purposes of justice alone. The evidence given to the jury by the deceased witness, must be proved, and it will not be sufficient that the witness should give his own inference, or depose to the legal effect, as the jury alone are competent to draw conclusions of fact from testimony.

In this case, the appellant below offered to prove by a competent and legal witness, “that when a jury was formerly empannelled to try this cause, *Eversfield Bowie*, who had been examined on the survey, who is since dead, and who had been sworn in court on the said trial, proved that the land had been in the possession of, and cultivated by *Fielder Bowie*, for a number of years, and that, as far as the witness could remember, he died in the seisin and possession thereof,” and so forth.

It is most evident then, that the witness was not produced for the purpose of proving the effect of the testimony given by the deceased witness, but to declare on oath what he did actually prove.

Whether the testimony which the witness would have given, if the court had permitted him to have been sworn and examined, would have been legally admissible, it is

JUNE 1821. impossible to anticipate, but as he was tendered for the purpose of giving testimony which was legal, he ought to have been heard, and then his proof, be it what it might, would have been a fair subject for judicial examination.

Queen
vs
The State

The court do not mean to intimate an opinion, whether any of the facts which the appellant offered to prove in the manner stated in the bills of exceptions, were or were not legally the subject of traditional proof.

The court therefore dissent from the opinion of the county court, as expressed in the *second* bill of exceptions, and reverse their judgment.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

COURT OF APPEALS, JUNE TERM, 1821.

QUEEN vs. THE STATE.

An indictment charging that the traverser "did assist a negro woman N, the slave of J. A. in eloping and running away from the said J. A. by accompanying her a considerable distance, and showing her the road by which she might escape, thereby depriving her master J. A. of the services of said slave," is sufficiently laid under the act of 1796, ch. 67, s. 19.

For error apparent on the face of the record in such criminal cases as are enumerated in the act of 1785, ch. 87, s. 6, there may be an appeal. A bill of exceptions is not allowed in criminal cases.

A party cannot impeach the credit of his own witness.

APPEAL from a judgment in *Anne-Arundel* county court, in a *criminal prosecution*. The indictment charged, that the traverser "on the," &c. "did assist a negro woman named Nelly, the slave of a certain James Anderson, of," &c. "in eloping and running away from the said James Anderson; by accompanying her a considerable distance, and showing her the road by which she might escape, thereby depriving her master, the said James Anderson, of the service of the said negro slave, contrary to the form of the act of assembly in such case made and provided, and against the peace, government and dignity, of the state." The traverser pleaded not guilty; and at the trial a witness was produced on the part of the state, who proved, that on the night the negro left the service of her master, the witness and the traverser were together on their way to the house of one A. L.; that in going they met with the slave mentioned in the indictment, and other slaves; that they accompanied them some distance, but did not sleep in the woods with them. After the examination of the said witness was closed, the district attorney, in behalf of the state, called another witness, and by her offered to prove, that the above witness had declared to her some time previously, that he did sleep in the woods with the said negroes. To this testimony the counsel for the traverser objected, and insisted, that as the said witness was produced by the state, any declarations which he had made out of

court, were not admissible testimony on the part of the state. JUNE 1821. But the court, [*Chase*, Ch. J. and *Ridgely*, A. J.] were of opinion, that the testimony was admissible on the part of the state to impeach the credit of said witness, and permitted the evidence to be given. The traverser excepted. The jury having found the traverser guilty, his counsel moved the court in arrest of judgment—1. Because the act with which the traverser was charged was not forbidden by the law upon which the prosecution was grounded. And 2. Because of the want of certainty in the description of the offence. The county court overruled the motion, and rendered judgment upon the verdict against the traverser for the penalty prescribed by the act of 1796, *ch.* 67. From this judgment the traverser appealed to this court, where the case was argued before BUCHANAN, EARLE, JOHNSON, MARTIN, and DORSEY, J.

Queen
vs
The State

Magruder and *T. B. Dorsey*, for the appellant, referred to the acts of 1796, *ch.* 67, *s.* 19, and 1785, *ch.* 87, *s.* 6. *Cumming vs. The State*, 1 *Harr. & Johns.* 340. *The Stat. of Westminster*, 2nd (13 *Edw. I.*) *ch.* 31. 1 *Bac. Ab.* tit. *Bills of Exceptions*, 528, and *note.* *Jacob's L. D.* tit. *Implead.* *Baker vs. The State*, decided in this court at June term, 1806. 1 *Phill. Evid.* 213, 215. *Bull. N. P.* 297. 3 *Bac. Ab.* tit. *Indictment*, 560, (*note;*) and *The King vs. Philipps*, 6 *East*, 464, 472, 473, 474.

Williams, (assistant attorney general,) and *Ridout*, (district attorney,) for the State, cited *Peake's Evid.* 135. *The State vs. Norris*, 1 *Hayw. Rep.* 439. 2 *Inst.* 427. 1 *Phill. Evid.* 213, 215. 1 *Chitty's C. L.* 622. 1 *Bac. Ab.* 528. *Tidd's Pr.* 786. *Willes's Rep.* 535, and *note;* and *McNally*, 325.

MARTIN, J. delivered the opinion of the court. The court are of opinion, that the indictment in this case is sufficient, and they affirm the judgment of the court below. This being a question of law apparent on the record, the party was authorised to appeal by the act of 1785, *ch.* 87, *s.* 6.

A bill of exceptions is not allowed in criminal cases, no such privilege was given by the common law, and the statute of *Wesminster* does not embrace it. It is evident from the language of that statute it was intended to apply to civil cases only.

JUNE 1821.

Creager
vs
Brenkle

The act of 1785 does not give a bill of exceptions in the criminal cases therein enumerated. Before that act, if error appeared on the record, it could be carried to the court of appeals only by a writ of error; this was attended, in many cases, with expense and inconvenience, to remedy which, the legislature gave the party complaining an election to carry up the case either by writ of error or appeal, and this is the only effect of that act of assembly.

In the case of *Baker against The State of Maryland*, the propriety of allowing a bill of exceptions in a criminal case, was not considered by the court; it passed *sub silentio*, and therefore is not an authority in this case.

The question contained in the bill of exceptions is not regularly before the court, and they can only say, if a similar point had been presented to them, they would have given a different decision.

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1821.

CREAGER vs. BRENGLE.

The *cestui que* use of judgments against a principal debtor and his surety, on receiving payment from the latter, can make no such assignment in the surety's favour as is provided for by the act of 1763, ch 23

That act contemplates on assignments by legal plaintiffs

Whether an assignee of a judgment, under the before mentioned act, can proceed against the special bail of the defendant—*Quere*

A surety, on paying a judgment debt of his principal, may in equity compel the creditor to assign the judgment, with all the liens given by the principal to secure it

At common law, if a surety in a bond, whether joint or several, pays the creditor the principal, he may, in an action against him by the creditor, plead such payment in bar

So, if such payment be made after judgments on the bond, and the creditor then proceeds against the bail of the principal, the bail can discharge himself by pleading the payment

Although a court of equity will compel an assignment of a judgment against a principal debtor, which has been satisfied by the surety, it will not authorise the surety to proceed against the special bail of the principal, unless such bail is absolutely fixed at the time of the assignment

APPEAL from the Court of Chancery. The bill states that *George Creager*, senior, being indebted to *Thomas Burke*, in \$1000, on the 1st of May, 1808, executed, with *Brenkle*, the complainant, (now appellee,) as his surety, a joint and several bond in *Burke's* favour; that the interest was paid thereon to the 10th April 1810, and that the complainant had himself paid \$300 of the principal debt. That afterwards the bond came into the hands of *John Gebhart*, who instituted separate suits against the obligors, in *Burke's* name, for his use, and obtained judgments for the balance due, &c. The bill further states, that the complainant often applied to *Creager* to pay the bond, or indemnify him as his surety, and that he refused to do either, and a short time before the judgment, removed to *Columbia*, and applied to the legislature of this state for the benefit of an act of insolvency, which was refused; that a certain *Henry Cronice* was special bail for *Creager* in said suit; that a *capias ad satisfaciendum* was issued

against *Creager*, on said judgment, to enable the plaintiff to proceed against the bail; and that the defendant, *George Creager, junior*, (the appellant,) in order to defraud the complainant, and combining with his father, applied to *Gebhart*, stating that he had funds of his father's to satisfy the judgment, and proposed to pay it, but that *Gebhart*, finding him only disposed to pay the balance remaining after deducting what had been paid by the complainant, requested that the complainant might be sent for, to which the defendant objected. *Gebhart* then received the money, and the defendant, instead of taking a receipt, took from *Gebhart* an order to the clerk to have the judgments entered for his, the defendant's, use. The bill further alleges, that the defendant undertakes to regulate the judgments, and holds the complainant answerable, which the complainant charges to be done in collusion with his, the defendant's, father, and to prevent the bail from bringing him into court to commit him, which would have been done, but the defendant represented to the bail, that he need not surrender him, and entered into an agreement to indemnify the bail. That the complainant tendered the whole amount of the sum paid on the judgments to the defendant, he giving him the right to proceed against the defendant's father, and the bail, which the defendant refused, and will not suffer a *scire facias* to issue against the bail. Prays relief and an injunction, &c. The answer of the defendant admits that *Creager*, the father, and the complainant, executed the bond stated in the bill—that it came to *Gebhart*, and that suits were instituted thereon, &c. and that the father, being unable to pay, a *ca. sa.* was issued; that the defendant called on *Gebhart* and paid the money, and had the judgments entered for his use, and that the money was paid in purchase of the judgments, and not in discharge of them; that the father had paid \$120 for two years interest, and the complainant had also paid \$300; that a statement was made, leaving a balance of \$814 88, which was paid by the defendant to *Gebhart*. It denies that the \$300 was paid as *principal*, but on the judgments generally, or that any representation was made to *Gebhart* that the money was had of his father, and that it was paid without the father's presence or knowledge, being borrowed by the defendant from the branch bank at *Frederick town*. It also alleges the defendant's entire owner-

JUNE 1821.

Creager
vs
Brenge

JUNE 1821. ship of the judgments, and admits that he has released the bail, and indemnified him. It also admits, that the defendant refused to receive the money tendered by the complainant, with leave for the complainant to proceed against the bail. It denies fraud, &c. The answer of *Creager*, the father, denies that he ever furnished the money, and states that he did not know that it was paid until April 20th, 1812.

Creager
vs
Brengele

On a motion to dissolve the injunction,

KILTY, Chancellor. There is in the answer of *George Creager*, junior, a denial of the fraud and combination as charged, and of the money being furnished by *George Creager*, senior; but there appears in the whole transaction a design to oppress and injure the complainant. The relief which is given by the son to the father is proposed to be at *Brengele's* expense, and the bail is not only indemnified, but secured from his liability, by the conduct of *George Creager*, junior, as avowed in his answer. By the act of 1763, *ch.* 23, a surety, who satisfies the judgment, is entitled to an assignment of it, and to proceed against the principal debtor by execution, which might probably include a proceeding against the bail. But *George Creager*, junior, admits that he refused to give such an assignment, unless the bail was exonerated. In this view of the case, the chancellor is not disposed to dissolve the injunction, unless he can be satisfied that he is bound so to do. The motion will therefore stand continued till July term next, when the effect of the want of the legal party may be considered, viz. whether *Gebhart*, the legal plaintiff at law, ought not to have been made a party in this case.

At the next term, the chancellor dissolved the injunction, not being satisfied that he would be justifiable in continuing it against the answer of the defendants, and leaving the complainant to procure the assignment of the judgment as the law may authorise. Commissions issued, and testimony was taken and returned. The cause was argued and submitted.

KILTY, Chancellor. My present impression is, that the last part of the order for the injunction, which related to the *scire facias*, [viz. "The chancellor is not satisfied that the injunction ought to be issued, as prayed, respecting the

scire facias,"] was grounded on the belief that the county JUNE 1821. court might interfere to have the *scire facias* issued. If the injunction had not been dissolved, and the complainant was thought entitled to relief, the decree would have been for making it perpetual. At present, if the money has been paid, as is suggested, it would be for a repayment. No opinion is given as to the amount of the evidence, or whether the complainant is entitled to relief, but it may be necessary, according to the practice, to have the payment stated in a supplementary bill or petition, and the relief prayed accordingly.

Creager
vs
Brengele

The complainant then filed a supplementary bill against *George Creager*, junior, alone, in which he stated, among other things, that on the 7th of September 1814, he paid to *George Creager*, junior, the whole of the money due on the judgment heretofore made an exhibit in the original bill. Prayer for a decree, that the money be repaid, &c. After which the death of *George Creager*, senior, was suggested. The answer of *George Creager*, junior, admits the receipt of the money mentioned in the supplementary bill—that *George Creager*, senior, is dead, intestate, and left three infant children, and the suit as to him is abated, and should be revived against his representatives, &c.

KILTY, Chancellor. (December Term, 1818.) This cause standing ready for hearing, has been argued by counsel on each side, since which the proceedings have been considered. I am of opinion, that the fraudulent conduct of the defendant, *George Creager*, junior, is sufficiently established by the testimony, to entitle the complainant to the relief prayed. This relief became necessarily varied under the supplemental bill, and the receipt for the money given to the complainant was admitted by the counsel in writing. The proper mode of relief is therefore a decree for the repayment of the money, with interest—*Decreed*, that the defendant shall forthwith bring into this court, to be paid to the complainant, or shall pay to the complainant, the sum of \$934 58, with interest from the 7th of September 1814, to the time of payment, &c. together with the costs of suit. From this decree the present appeal was prosecuted.

The cause was argued before CHASE, Ch. J. BUCHANAN, EARLE, JOHNSON, MARTIN, and DORSEY, J.

JUNE 1821. *Pinkney, Taney and Schley*, for the appellant, cited the act of 1763, ch. 23. 2 *Madd. Chan.* 408. *Parsons & Cole vs. Briddock*, 2 *Vern.* 608. 1 *Madd. Chan.* 350. *Greenaway vs. Adams*, 12 *Ves.* 395. *Gwillim vs. Stone*, 14 *Ves.* 128; and *Craythorne vs. Swinburne*, 14 *Ves.* 167.

Creager
vs
Brengle

R. Johnson, for the appellee, relied on *Davis vs. Simpson, et al.* ante 147. *Wright vs. Morley*, 11 *Ves.* 22. *Ex-parte Peachy*, 1 *Atk.* 133. *Cheesebrough vs. Millard*, 1 *Johns. Chan. Rep.* 412. *Rees vs. Berrington*, 2 *Ves. jr.* 542; and *Hilleary vs. Crow*, 1 *Hurr. & Johns.* 542.

DORSEY, J. delivered the opinion of the court. In examining the decree of the chancellor, the first inquiry which must engage the attention of the court is this—Was the money paid by *George Creager, junior*, to *Gebhart*, the menoy of *George Creager, senior*, or was it the money of the former, and paid by him in purchase of the judgments? The complainant in his bill charges that the money was furnished by the elder *Creager*, and paid by *Creager, junior*, to *Gebhart*, in satisfaction of the judgments. *Creager, the younger*, in his answer swears, that no part of the money was furnished by *Creager, senior*, that he borrowed the same from the *Frederick Town Branch Bank*, and that the payment was made by him to *Gebhart* in the absence, and without the knowledge of *Creager, senior*, in purchase of the judgments, and not in discharge or satisfaction thereof. *Creager, senior*, in his answer, most explicitly denies that he furnished the money, or had any agency in borrowing the same, or in its subsequent application; and the answers of both these defendants, in relation to this point, are supported by *Lewis Creager*, who proves that the money paid to *Gebhart* belonged to *Creager, junior*, and was raised on paper discounted for his use at the *Frederick bank*, and this witness, on his cross examination, states the motives which induced *Creager, junior*, to purchase the judgments. The answers of *Creager, senior*, and *Creager, junior*, when considered in connexion with the testimony of *Lewis Creager*, furnish, in the opinion of the court, a mass of testimony, which must be considered as conclusive. To be sure *Gebhart* swears that it was his impression, at the time of receiving the money, that *Creager, junior*, meant to discharge the judgment, but he does not disclose the grounds of his impression, and it is most evident that the circum-

stance of *Creager*, junior, requiring an assignment of the JUNE 1821.
 judgment, when he paid the money, was calculated to create an impression, the very reverse of that which was made on the mind of *Gebhart*; and the impatience manifested by *Creager*, junior, to procure the assignment, before the complainant could be present, was perfectly consistent with the fact of his being a purchaser, and is fairly referrible to the apprehension that the complainant would endeavour, if present, to prevent *Gebhart* from making the assignment. The other testimony offered by the complainant on this point, is considered by the court as inconclusive, and at best only calculated to create slight suspicions, which cannot prevail against the unambiguous answers of the defendants, supported as they are by the positive testimony of *Lewis Creager*. It is clear, therefore, that the decree of the chancellor cannot be supported on the ground that the money paid to *Gebhart* was paid in discharge of the judgments.

Creager
 vs
 Brengle

We proceed to inquire, whether there is any other foundation on which the decree can be sustained? It has been urged by the complainant's counsel, that the complainant, on tendering to *Creager*, junior, the amount of the judgments, was entitled to an assignment of the judgment against *Creager*, senior, with liberty to proceed against his bail, and that as *Creager*, junior, refused to assign the judgment, unless the complainant would engage not to pursue the bail, the receipt of the money due on the judgments by *Creager*, junior, was against conscience, and that therefore a court of equity would be well warranted in decreeing a repayment thereof. It must be observed, that the act of 1763, *ch.* 23, cannot be brought in aid of this position. That act provides, "that where any person or persons shall recover judgment against the principal debtor and surety, and such judgment shall be satisfied by the surety, that the creditor shall be obliged to assign such judgment to the surety satisfying the same, and that the assignee shall be entitled unto, and have in his own name, as assignee, the same execution against the principal debtor, in virtue of such assignment and this act, as the creditor might or ought to have had, the said assignment being first recorded in the said court wherein the judgment shall have been rendered or obtained." From the language and provisions of this act, it is evident that the legislature contemplated an assignment of

JUNE 1821.
 {
 Creager
 vs
 Brengle
 the judgment by the legal plaintiff. The act uses the expressions, creditor and original debtor, and provides that the assignee shall, in virtue of the assignment, have an execution in his own name against the principal; now, if a *cestui que use* was obliged, under this act, to assign the judgment to the surety, on his paying the same, the assignee would be entitled to sue out an execution in his own name, when his assignor would have been obliged, if he had not assigned, to have enforced the judgment in the name of his trustee, to wit, the legal plaintiff, a construction which produces such an anomaly ought not to be given to the act, and it would be an anomaly indeed to hold, that an assignee of a judgment should have a legal remedy in his own name, when the person under whom he claims, and to whose rights he is substituted by assignment, had no such remedy. Whether a surety who had paid the amount of a judgment, and has received from the legal plaintiff a statutory assignment, can proceed against the bail of the principal, on a *ca. sa.* being returned *non est*, or whether such bail could, on the plea of payment, defend himself on the ground that the payment made by the surety operates as a payment by the principal, so far as respects the bail, are questions which it is not necessary to decide in this cause.

The next enquiry is, whether on principles of equity, the complainant had a right to demand from *Creager, junior*, an assignment of the judgment against *Creager, senior*, on his paying or tendering to him the amount of the judgment? On this point the court have no doubt. It is a well established principle of equity, that the surety on paying the debt of the principal debtor, has a right in a court of chancery to call on the creditor for an assignment of the judgment, and all liens which the principal has given to the creditor. But whether the bail of the principal could not plead the payment made by the surety, in virtue of which he obtains the assignment, as a payment by the principal, or whether a court of equity, which decrees the assignment, would not enjoin the surety from proceeding against the bail, are questions entirely distinct from the right of the surety to claim an assignment of the judgment against the principal. On principles of common law, and independently of any statutory provision, we hold it to be clear, that if a surety in a bond, whether the same be joint or several, pays the amount to the creditor, the principal

May, on a suit instituted against him by the creditor, rely on such payment as a bar to the suit—So also, if the surety pays the amount of the debt after judgments are obtained against him and the principal, and the creditor should proceed against the bail of the principal, the bail might discharge himself by pleading the payment, and giving in evidence the payment made by the surety. The creditor, although he has different securities, is entitled to but one satisfaction, and the payment by the surety would operate as an extinguishment of the creditor's right to charge the bail, otherwise the surety in the foregoing cases would not be able to maintain an action against the principal for money paid, laid out and expended for his use. Such at common law is the legal effect of a payment made by the surety in every case where the principal, or his bail, have an opportunity of pleading such defence in bar of the action, or *scire facias*, as the case may be. But if we should admit that the bail of the principal could not at law avail himself, by way of defence, of a payment made by the surety, and in virtue of which the court of chancery had decreed an assignment of the judgment against the principal, still we think that the chancellor would enjoin all proceedings against the bail. What equity has the surety, who became bound with his principal, to look to the bail of the latter, and who were not fixed at the date of the assignment, for his indemnity? Their engagements were not contemporaneous, or of the same nature. The undertaking of the surety was long prior in point of time to that of the bail, and the extent and nature of their obligations were essentially different. The surety stipulated absolutely and unconditionally for the payment of the money; and the debt which he engaged to pay, with reference to the creditor, was his own debt. The engagement of the bail was contingent; he undertook that the principal would, if a judgment was rendered against him, either pay the amount thereof, or surrender himself to prison. This engagement, therefore, could be gratified by the performance of a collateral act unconnected with the discharge of the creditor's claim—nay, the undertaking of the bail became inoperative in the event of the death of the principal before the return of a *ca. sa*. The engagements, therefore, of the surety and bail were not *ad idem*. The surety, when he became bound for the principal, looked to him, and such fixed se-

JUNE 1821.

Creager
vs
Brangin

JUNE 1821. curities as he had given to the creditor, for his indemnity; and to permit him to proceed against the bail, who were not fixed at the time of the assignment, would be contrary to the first principles of justice. If the surety had this right, it would necessarily follow that the creditor could, at no stage of the proceedings after the bail piece was filed, enter an *exoneretur* against the consent of the surety. The latter might address the creditor in this language—"Upon paying the debt for which I was bound as surety, I am entitled to the benefit of all securities, whether absolute or contingent, which the principal had given to you, and as you have released the bail, you have impaired my security, and thereby discharged me from my engagement." But the power of the creditor to release the bail of the principal before judgment, has never been questioned. We may safely say, a judicial doubt has never been breathed on the subject. The case of *Parsons & Cole vs. Briddock*, cited from 2 *Vernon*, 608, does not apply. The principal had given bail in an action—Judgment was recovered against the bail—afterwards the surety was called upon and paid, and it was held, that he was entitled to an assignment of the judgment against the bail. It will be borne in mind, that a judgment in the foregoing case was obtained against the bail before the surety paid the debt of the principal, the contingent engagement of the bail had passed in *rem judicatam*, and the bail as a debtor, stood in the place of the principal, and therefore, as the bail came in the room of the principal debtor as respected the creditor, they likewise came in the room of the principal debtor as respected the surety. And although this case has pushed the doctrine of substitution to its utmost verge, it affords no principle by which the claim of the complainant in this case can be supported. As the bail, therefore, of *Creager*, senior, could not have been made liable, if an unqualified assignment had been made by *Creager*, junior, to the complainant, we think that the latter ought to have received the assignment which the former was willing to give. For these reasons we think that *Creager*, junior, could conscientiously retain the money paid to him by the complainant.

CHASE, Ch. J. The case now before the court is, that *George Creager*, senior, with *Lawrence Brengle* his secu-

rity, executed a joint and several bond on the 1st May 1808, JUNE 1821. to *Thomas Burke*, for \$1000. The bond, by an equitable assignment, came into the hands of *John Gebhart*, who instituted separate suits against both obligors, in *Burk's* name, for his use, and obtained judgments for the balance due. The judgment against *Brengle* to be released on payment of the judgment against *Creager*, and costs.

Creager
vs
Brengle

By the act of 1763, *ch. 23, s. 8*, if a surety pays the money due on the judgment, the judgment creditor shall be obliged to assign the judgment to the surety satisfying the same, and the assignee shall have in his own name the same execution against the principal debtor by virtue of such assignment, and this act, as the creditor might have had, the said assignment being first recorded in the same court.

No person could be, or was entitled to, a legal assignment of the judgment but *Brengle*, the surety. No person could give a legal assignment but *Thomas Burke*, in whose name the judgment was obtained for the use of *Gebhart*. *Gebhart* had sold his equitable interest to *Creager*, junior, who had it entered on the docket, by the order of *Gebhart*, for *Creager's* use. The money paid by *Creager* to *Gebhart* was obtained from the bank of *Frederick*, and was not the money of his father. *Creager*, junior, having purchased the equitable interest of *Gebhart*, had the full control over it, and might dispose of it in what way he pleased; he might release the bail, and proceed against the original defendant, or he might retain full power over it, and suffer it to remain as it was. The surety, *Brengle*, had no right to interfere until he got a legal assignment of the judgment from the judgment creditor, and no attempt has been made to obtain such assignment of the judgment. As it appears to me, *Brengle*, the surety, had no right to call on *Creager*, junior, for the assignment of his equitable right; and if he did, it was at the option of *Creager* to refuse or comply on such terms he might think proper to prescribe. His refusal or compliance, on certain terms, could be no fraud or injury to *Brengle*. On the proof in the case, *Creager*, junior, was a *bona fide* purchaser, with his own money, of the equitable interest, and nothing appears to impeach his title. The motives which induced him to come forward are no ingredients of fraud, nor do they diminish or impair his right to the money. The bail was not

JUNE 1821, fixed, and could not be fixed, until all the legal steps were pursued, and a judgment obtained against the bail.

Creager
vs
Brangle

As it appears to me, *Brangle*, the surety, had only one course to pursue to obtain the money he had paid for the principal debtor; that was, the using the proper means to obtain a legal assignment from the judgment creditor. If a legal assignment had been obtained, under the act of 1763, from the judgment creditor, the assignee would have been clothed with all the right of such creditor—would have stood in his shoes, and could, in his own name, have proceeded to fix the bail, by suing out a *ca. sa.* against the principal, &c. This, in my opinion, is the plain and fair exposition of the act of 1763, and will place the surety, where it was intended he should stand, in the shoes of the judgment creditor. This construction gives the assignee all the rights of the judgment creditor for his indemnification, which accords with the intention of the act, and does not increase the responsibility, or change the liability of the bail. It is conceded that the equitable assignee can, in the name of the assignor, take every step, and issue all process, necessary for fixing the bail, and subjecting him to the payment of the money; and what good reason can be suggested why the legal assignee should not, in a court of law, enjoy the same rights? The right to issue execution against the original debtor is expressly given, and the right to proceed against the bail is an incident growing out of the right to issue execution against the debtor, and results from it; and why not? It does not augment the liability of the bail, or change his condition in any respect. If, according to a confined and literal interpretation of the act of 1763, the legal assignee could not pursue the bail to indemnify himself, it would be better to accept of an equitable assignment, because the equitable assignee, by pursuing the bail in the name of the assignor, and obtaining a judgment against him, would render him liable to the payment of the debt.

I do suppose, independent of the act of assembly, the surety who paid the money due on the judgment could have no right to demand an assignment of the judgment; all that he could require was a receipt, or release, which would entitle the surety to demand a repayment of the same as so much money paid and expended for his use.

I am of opinion there has been no fraud or collusion in JUNE 1821. this case, and that the decree of the chancellor ought to be reversed.

Hammond
vs
Ridgely

DECREE REVERSED.

COURT OF APPEALS, JUNE TERM, 1821.

HAMMOND vs. RIDGELY's Lessee.

APPEAL from a judgment rendered in *Anne-Arundel* county court in an action of ejectment brought to recover two tracts of land, one called *Dorsey's Search*, (the original survey,) and *Dorsey's Search*, (the resurvey thereon,) lying in *Anne-Arundel* county. The defendant in the court below, (now appellant,) took defence for a tract of Whatever question on the late court of appeals, is equally binding on the present court of appeals. Whether the 56th article of the constitution, which provides "that there shall be a court of appeals composed of persons of integrity," &c. "whose judgment shall be final and conclusive in all cases of appeals," &c. means simply that the court of appeals should be a tribunal of ultimate resort? *Quere* Whether the verdict and judgment in one action of ejectment is a bar to a recovery in another? *Quere*

Whether the expressions in the act of 1790, *ch* 42, "that the opinion of the court of appeals shall be conclusive in law as to the question by them decided," means only, that the opinion of the court of appeals shall be conclusive upon the inferior court on the new trial of the particular suit sent back to them by a *procedendo*, and can have no reference to any subsequent suit? *Quere*

If an action of ejectment is entered for the use of any person, such person is substantially a party to the action

The construction of a grant of land falls peculiarly within the province of the court, and is not a matter fit to be left to a jury, except only in a case of latent ambiguity

Where a grant of a tract of land is described as "lying on the W side of the N branch of *Patuxent* river, beginning at a bounded red oak, standing by the said river, and running (three courses) to a bounded white oak standing by the said river, then bounding on the said river running S 5 degs E 270 perches, then by straight line to the first bounded tree"—*Held*, that the fifth or last line thereof must and could only be located by running a straight course from the end of the fourth line, wherever that may be, to the beginning, and the meanders of the river *Patuxent* could not be pursued without a direct violation of the grant

So also, where a grant of a tract of land is described as "beginning at three bounded white oaks standing by *Patuxent* river, and running and bounding on the said river N 4 degs. E 87 perches, then N (sundry courses) then N 1 deg. W 48 perches to a bound white oak by the river, then S 47 degs. E 388 perches, to a bound white oak, then by a straight line to the first bounded white oaks"—*Held*, that the first course is to be run N 4 degs. E 87 perches, thence the same on the river *Patuxent*, and all the subsequent courses are to be run according to the course and distance, until the course N 1 deg. W 48 perches

So also where a tract of land is described in a grant as "lying in the fork of *Patuxent* river, beginning at a bounded white oak standing near the head of a branch, running from the said branch S W by W 180 perches to a bounded red oak standing on the E side of the W great branch of the said river, then bounding on the said great branch, running W N W 40 perches, then W S W 28 perches, then (sundry courses) then N and by E 16 perches to a bounded beech standing by the said branch, then into the woods N E by N 220 perches to a bounded red oak," &c.—*Held*, that the true construction of the grant is to bind on the *Patuxent* river from the second boundary, (admitted to be standing by the the east side of the western great branch of the said river,) the several courses mentioned in the grant, to the bounded beech standing by the said great branch; and that if there was no satisfactory proof of the beech, or the place where it stood, then the course N and by E 16 ps. must terminate by the great branch: (Note)

A deputy surveyor has no authority to survey lands lying in another county, and on the return of his certificate of such survey, a grant, on a caveat, would be refused. But if a grant was obtained, and no fraud practised in the obtaining of it, it will operate to pass the land

Where there are conflicting grants and interfering locations of the lands of A and B, and the part of the land claimed by A is within the lines of the grant to B; and A, and those under whom he claimed, had been in possession, and used and occupied the part so claimed by him for upwards of 100 years, the court will not direct the jury to presume a deed from the grantee, under whom B claimed, to the grantee under whom A claimed, for the part thus claimed, or that there had been an actual custer of such part. But if A, and those under whom he claimed, were in the adversary, uninterrupted, and exclusive possession, by enclosure, of the land in dispute, for 20 years, that in such case B will be barred by the act of limitations

A devise of a tract of land by name, and described as lying in *Baltimore* county, passed the whole tract, though part of it lay in another county

If the grantor in a deed is in possession of part of the tract of land conveyed, that possession will extend to the whole tract, unless there had been an adversary, uninterrupted, and exclusive possession, by enclosures, of a part of the land, by some other person, for 20 years prior to the execution of such deed

JUNE 1821. land called *Dorsey's Inheritance*, as located upon the plots made in the cause.

Hammond
vs
Ridgely

1. At the trial, the plaintiff, (now appellee,) read in evidence a certificate and grant of the tract of land called *Dorsey's Search*, surveyed by the surveyor of *Anne-Arundel* county, for *John Dorsey*, on the 6th of December 1694, and granted to him on the 26th of March 1696, stating the said tract as "lying at *Elk Ridge*, beginning at three bounded white oaks standing by *Patuxent* river, and running and bounding on the said river N 4° E 87 perches, then N 62° E 50 perches, then," &c. [*sundry courses*,] "then N 1° W 48 perches to a bound white oak by the river, then S 47° E 388 perches to a bound white oak, then by a straight line to the first bounded white oaks, containing, and now laid out for 479 acres of land," &c. He also offered evidence, that *John Dorsey*, the grantee, entered upon the said land in virtue of the said grant, had a plantation thereon, and died in the year 1714, having by his will, dated the 26th of November 1714, among other things, devised as follows, viz. "I give and bequeath unto my grandson, *John Dorsey*, son of my son *Edward Dorsey*, deceased, my *Patuxent* plantation, and the land thereunto adjoining, called *Dorsey's Search*, lying in *Baltimore* county, to hold to him during his natural life; and from and after his decease, then I give, devise, and bequeath my aforesaid land and plantation, given him as aforesaid, unto the heirs of the body of my said grandson *John Dorsey*, to be begotten, for ever; and for want of such heirs, then," &c. He then offered evidence that the last named *John Dorsey* entered on the said land, and on the 27th of March 1723, resurveyed the same by the surveyor of *Baltimore* county, and obtained a certificate thereon, also called *Dorsey's Search*, on which he obtained a grant dated the 10th of June 1734, "for all that tract or parcel of land called *Dorsey's Search*, with its vacancy added, lying and being formerly in *Baltimore*, but now in *Anne-Arundel* county aforesaid, on *Elk Ridge*, and on the east side of *Patuxent* river, beginning at three bounded white oaks, (being the third boundary of the land called *Long Reach*,) standing near the aforesaid river side, said trees being the original beginning trees of the said *Dorsey's Search*, and running thence up and with the said river, N 4° E 124 perches, thence," &c. [*sundry*

courses,] “to a parcel of land called *Dryer’s Inheritance*, JUNE 1821. thence with said land N 9° E 185 perches, thence,” &c. [two courses,] “to an original bounded white oak of *Dorsey’s Search*, thence S 47° E 432 perches, to the land called *Long Reach*, thence with the said land to the aforesaid three bounded white oaks, containing and now laid out for 750 acres of land more or less.” He also offered evidence to prove, that *John Dorsey*, the devisee, entered upon *Dorsey’s Search*, (the resurvey,) and died seized thereof, and of *Dorsey’s Search*, (the original,) in the year 1761, having by his will, dated the 15th of June 1761, devised unto his son *Benjamin Dorsey*, and his heirs, “all the land taken by warrant of resurvey adjoining to *Dorsey’s Search*.” The plaintiff then, to prove that the said tracts of land, both the original and resurvey, did run and lie both on the east and west side of *Patuxent* river, offered in evidence the original certificate of the resurvey on *Dorsey’s Search*, made for the party as aforesaid. He then offered evidence that *Dorsey’s Search*, the original, descended, on the death of *John Dorsey*, the devisee aforesaid, to *Ely Dorsey* his heir in tail, who entered thereon and was possessed thereof, and that he and *John C. Dorsey*, his eldest son, on the 26th of September 1777, conveyed *Dorsey’s Search*, the original, to *Joseph Howard*; and that *Howard* afterwards, on the succeeding day, reconveyed the same land to *Ely Dorsey*; and that *Ely Dorsey* died in the year 1794, having by his will dated the 22d of October 1789, devised to his executrix, (*Deborah Dorsey*,) for the purpose of selling the same, the tract of land called *Dorsey’s Search*, the same to be sold at public vendue to the highest bidder, after notice, &c. and the money arising from the sale to be equally divided between the children of his two daughters, &c. That *Deborah Dorsey* entered upon the said lands, and by virtue and in pursuance of the powers given to her by the said will, sold and conveyed the said lands to *Richard Ridgely*, by deed bearing date the 15th of March 1796. That *Richard Ridgely* entered upon the said land, and by his deed dated the 16th of March 1796, conveyed the same to *Daniel Dorsey* by way of mortgage. The plaintiff then offered evidence, that *Benjamin Dorsey* above named, in virtue of the will of his father, entered into the land called *Dorsey’s Search*, the resurvey, and on the 13th of September 1774, conveyed the same to *Elea-*

Hammond
vs
Ridgely

JUNE 1821. *nor Dorsey*, wife of *Samuel Dorsey*, and that she and her husband entered thereon; that the said *Eleanor* survived her husband, and after his death conveyed the said last mentioned land to *Harry Woodward Dorsey*, by her deed bearing date the 28th of November 1794; and that *Harry Woodward Dorsey* entered thereon, and conveyed the same to *Richard Ridgely*, by deed dated the 16th of April 1798. That *Richard Ridgely* entered thereon, and conveyed the same to *Daniel Dorsey*, by his deed of mortgage dated the 18th of April 1798. The plaintiff, to prove that *John Dorsey*, the grantee of *Dorsey's Search*, the original, and all those claiming under him, always claimed, possessed and used the said land; according to the true location, on both sides the river *Patuxent*, read in evidence, by consent, the depositions of the said *Benjamin Dorsey*, and *Ely Davis*. The plaintiff then gave in evidence two deeds from *Daniel Dorsey* to *Richard Ridgely*, the lessor of the plaintiff, one dated the 8th of April 1814, and the other dated the 15th of August 1818, being releases of the deeds of mortgages herein before mentioned. And that *Richard Ridgely*, the lessor of the plaintiff, is the same *Richard Ridgely* who conveyed *Dorsey's Search*, the original, and *Dorsey's Search*, the resurvey, to *Daniel Dorsey*, by deeds of mortgage herein before mentioned; and that the said *Ridgely*, from the time of the execution of the deeds before mentioned from him to *Daniel Dorsey*, has always remained in the possession of both of the said tracts of land. And he offered evidence that the plots, certificates and explanations, in this cause, as there made by the plaintiff, are correctly and truly located. He also read in evidence a certificate of *The Addition*, surveyed for *Thomas Brown* on the 16th of September 1707; also a certificate of *The Triangle*, surveyed for *Charles Hammond* the 20th of June 1761; and also a certificate of *The Attempt*, surveyed for *William Hammond* the 3d of March 1796. The defendant then read in evidence a certificate and grant of the tract of land called *Dryer's Inheritance*, surveyed for *Samuel Dryer* on the 25th of February 1695, and granted to him on the 10th of March 1695, stating that tract as "lying on the west side of the north branch of *Patuxent* river, beginning at a bounded red oak standing by the said branch, it being a bounded tree of *Thomas Brown's*, and running N 62° W 86 perches to a

Hammond
vs
Ridgely

bound red oak in a branch, then N 6° W 362 perches to a bound white oak, then N 66° E 120 perches to a bound white oak standing by the said river, then bounding on the said river, running S 5° E 270 perches, then by a straight line to the first bounded tree, containing and now laid out for 254 acres of land," &c. The defendant then read in evidence certificates and grants of the following tracts of land, viz. *Brown's Forest*, surveyed for *Thomas Brown* the 24th of February 1695; *Freeborn's Progress*, surveyed for *Thomas Freeborn*, the 25th of October 1695; *Dorsey's Search*, the original, and *Dorsey's Search*, the resurvey, before mentioned; and also *Hammond's Inheritance*, surveyed for *Rezin Hammond* the 1st of March 1796. And the defendant offered in evidence the plots and explanations in this cause, and that the locations of those respective tracts of land, as there made by her, are truly and correctly made. She then offered in evidence, that *Samuel Dryer* entered upon *Dryer's Inheritance* under his grant, and possessed himself thereof; and entered into a contract with *Amos Garrett* to convey to him the said land, by bond dated the 4th of September 1708. And also a deed from *Dryer*, and his wife, to *Garrett*, dated the 8th of September 1708, conveying to him the said land. She also offered in evidence a deed for the said land called *Dryer's Inheritance*, from *William Woodward*, *Mary Holmes*, and *Elizabeth Ginn*, to *Philip Hammond*, dated the 30th of September 1736, which deed recites, among other things, that *Amos Garrett* died intestate, whereby all his real estate descended to and vested in *Mary Woodward* and *Elizabeth Ginn*, his two surviving sisters, as parceners or tenants in common; that *Mary* is since also dead, having by her will devised unto *William Woodward* and *Mary Holmes*, their heirs and assigns, all her undivided moiety of the said real estate, &c. And that the said deed was duly executed by the said grantees to the said *Hammond*; and that the recitals in the said deed were true. The defendant then offered in evidence, that *Philip Hammond*, by virtue of the said deed, entered into *Dryer's Inheritance*, and by his will, dated the 6th of June 1754, he devised the said tract of land, amongst others, to his six sons *Charles*, *John*, *Philip*, *Denton*, *Rezin* and *Matthias*, and their heirs, as tenants in common; and that on the 20th of May 1760, the devisees in the said will having entered up-

JUNE 1821

Hammond
vs
Ridgely

JUNE 1821. On and become seized of the lands devised to them by the said will, as tenants in common, the said *Charles, John, Philip, Denton and Matthias*, conveyed all their right, &c. in the said land, to the said *Rezin Hammond*, by several deeds, that by *Charles* bearing date the 28th of July 1773; that by *John* on the 24th of March 1772; that by *Philip and Denton* on the 18th of January 1774, and that by *Matthias* on the 21st of April 1777. And gave in evidence that the defendant is entitled to *Dryer's Inheritance* and *Hammond's Inheritance*, under the said *Rezin Hammond*, who is dead.

Hammond
vs
Ridgely

The plaintiff and defendant both offered in evidence sundry other matters and things, but as they were not taken into consideration by the court in deciding the questions which arose in the case, they are omitted. The defendant also offered in evidence the record of proceedings in an action of ejectment brought in the late general court by *Daniel Dorsey's* lessee, against *Rezin Hammond*, and the judgment therein. [The evidence offered in that action was similar to that offered in this action, but much of which is omitted here, and also in the report of that case in 1 *Harris and Johnson's Reports*, 190, in which said action the jury found a verdict for the plaintiff, and a judgment was rendered for him at October term 1801; and from which judgment the defendant therein, appealed to the court of appeals.] The defendant also offered in evidence the record of the proceedings and judgment of the court of appeals, on an appeal in that court prosecuted by the said *Rezin Hammond* against the said *Daniel Dorsey's* lessee, and the opinion of the court of appeals thereon, reversing the judgment of the general court, which had been rendered for the plaintiff in that court, and awarding a *procedendo*. [See 1 *Harris and Johnson*, 201.] The defendant also gave in evidence, that notwithstanding the deeds from *Richard Ridgely* to *Daniel Dorsey*, herein before mentioned, the said *Ridgely* remained in possession of the lands mentioned in the said deeds; and that the said action of ejectment, instituted in the general court in the name of *Daniel Dorsey's* lessee against *Rezin Hammond*, was instituted by the said *Ridgely*, and for his use, by his directions; that it was on the part of the plaintiff, conducted by him, and under his directions; that the lawyers, who appeared on behalf of the plaintiff, were employed by him, and the expenses of the said

JUNE 1821.

Hammond
vs
Ridgely

suit in the different courts were paid by him. The defendant further offered in evidence the record of proceedings in the said action of ejectment, by *Daniel Dorsey's* Lessee against *Rezin Hammond*, after the judgment of the court of appeals, under the *procedendo* in that cause, wherein, on a new trial thereof, the jury gave their verdict for the defendant therein, and a judgment was rendered thereon at October term 1804, [See 1 *Harris and Johnson*, 202.] The defendant further offered in evidence, that the grantees, devisees, and alienees of *Dorsey's Search*, the original, and *Dorsey's Search*, the resurvey, only actually entered respectively by virtue of the respective grants, wills and deeds, upon the said land, situate on the east side of the river *Patuxent*, and that all the land on the west side of *Patuxent*, contained within the limits of *Dryer's Inheritance*, according to the first location thereof made by the defendant, was, long before the resurvey of *Dorsey's Search*, entered upon by *Samuel Dryer*, and held and possessed, used, and occupied by him, and that the same hath ever since been held, possessed, used and occupied, exclusively by the said *Dryer*, and those holding under him, claiming the same as their property and right; and that the locations made on the plots by the defendant, where they differ from the locations of the plaintiff, are correct. The plaintiff then prayed the opinion of the court, and their direction to the jury, that the true construction of the grant of *Dryer's Inheritance* is to run the fourth line thereof binding on *Patuxent* river, from the boundary admitted by the parties marked on the plots at the figures 14 and 15, and from the point on the river where the jury shall find the said fourth line to terminate, to run a straight line to the first bounded tree of *Dryer's Inheritance* marked on the plots at the figures 53. The defendant thereupon objected, that the court could not, consistently with their duty, give the opinion prayed for, because the court of appeals had heretofore given an opinion upon the same question arising on the same location of the said certificate and grant of *Dryer's Inheritance*, and on solemn argument had adjudged, that the expressions of the said certificate and grant are doubtful and uncertain, and that it is the province of the jury to determine upon such evidence as might be offered to them, whether the said tract shall bind

JUNE 1821.

Hammond
vs
Ridgely

on the last line with the river or not; which opinion and judgment of the court of appeals remains in full force, and has never been reversed or overruled, and consequently, the defendant contends, is binding on this court, as an inferior tribunal in all cases where this question can occur, but particularly in the present case, which is between the defendant, who claims under *Rezin Hammond*, the defendant in that cause, and *Richard Ridgely*, for whose use that suit was not only stated on the record to be brought, but was actually instituted and prosecuted. And the defendant gave in evidence to the court, that although deeds had been executed by *Ridgely* to *Dorsey*, as in the said record, yet that *Ridgely* remained in possession of the lands mentioned in the said deeds, and that the said suit was commenced and conducted by his directions; that he employed and paid counsel for the plaintiff; entered into agreements with the defendant, as the person actually interested, and the real plaintiff, although *Daniel Dorsey's* lessee was the nominal plaintiff, and that he paid not only the defendant's costs of the said action, as being answerable to the defendant for them, but also the fees which accrued against the plaintiff therein. Wherefore the defendant prayed the opinion of the court, whether they were not concluded by the judgment of the court of appeals from giving the directions as prayed. The defendant also objected to the court's giving the opinion as prayed by the plaintiff, because the same was not warranted by the grant of *Dryer's Inheritance*, which was in truth doubtful and uncertain, as to whether that tract should be bounded on the last line by the river, which must be decided by the jury on evidence to be offered to them; and the defendant offered to prove, that it was the intention of the parties that the said tract should so bind by the river; and for that purpose, to prove, that in a great number of surveys made by *Richard Beard*, the surveyor who made the survey of *Dryer's Inheritance*, he has used similar expressions, where it is notorious they were intended to bind all their river courses by the water, and where they have been admitted, or decided judicially, that they ought so to be located. That *Dryer* entered upon the said survey, claimed it as binding with the river, built his house at figures 103 on the plots, more than 100 years past; made his improvements between the home line and the river; used and occupied all the land between the fourth and fifth lines, and the river, claimed as his property and

right; and that he, and those claiming under him, have ever since so used, occupied, held, possessed and claimed. That the original grantee of *Dorsey's Search*, the original, never entered upon, held, occupied or claimed, any part of the land on the west side of the river, but acknowledged, that that survey did not include any land on the west side of the said river; that the grantee of *Dorsey's Search*, the resurvey, neither held nor claimed any land on the west side of the said river; and that no person claiming under the said grantees, or either of them, ever held or possessed any land on the west side of the said river, or pretended to claim any land on the west side until more than thirty years after the said resurvey was made. The defendant then referred to the record and decision made by this court in the suit of *Charles Duvall* against *Nathan Jones*, and the plots and explanations in that cause, and the certificate and grant of *Robin Hood's Forest*, there located(a).

JUNE 1821.

Hammond
vs
Ridgely

(a) The case here referred to, was an action of trespass *quare clausum fregit*, being a tract of land called *Robin Hood's Retreat*. The defendant took defence upon plots made in the cause for a tract of land called *Robin Hood's Forest*, as covering the land on which the trespass was alleged to have been committed. At the trial of the cause at April term 1818, the defendant read in evidence the grant of *Robin Hood's Forest*, in which that tract is stated as "lying in the fork of *Patuxent* river, beginning at a bounded white oak standing near the head of a branch, running from the said branch S W by W 180 perches, to a bounded red oak standing on the east side of the west great branch of the said river, then bounding on the said great branch running W N W 40 perches, then W S W 28 perches, then," &c. &c. "then N and by E 16 perches to a bounded beech standing by the said great branch, then into the woods N E by N 220 perches to a bounded red oak," &c. And prayed the opinion of the court, and their direction to the jury, that in locating the second line of *Robin Hood's Forest*, they must run the same from the boundary, (admitted by both parties,) marked on the plots at the letter E, binding on the said branch of *Patuxent* river, and then from the end thereof, run the thirty-two following lines, course and distance, independently of and without regarding the preceding call in the grant of binding and running with the said branch of *Patuxent* river.

A grant of land described as "lying in the fork of *Patuxent* river, beginning at a bounded white oak standing near the head of a branch, running from the said branch S W by W 180 perches to a bounded red oak standing on the E side of the W great branch of the said river, then bounding on the said great branch, running W N W 40 perches, then W S W 28 perches, then" &c. "then N and by E 16 perches to a bounded beech standing by the said great branch, then into the woods N E by N 220 perches to a bounded red oak," &c. must be located to bind on *Patuxent* river from the second boundary, standing by the E side of the western great branch of the river, the several courses mentioned in the grant, to the bounded beech standing by the said branch.

CHASE, Ch. J. (a). The court are of opinion, that the true construction of the grant of *Robin Hood's Forest*, is to bind on the *Patuxent* river from the letter E on the plots, (admitted to be the second boundary standing by the east side of the western great branch of the said river,) the several courses mentioned in the grant, to the bounded beech standing by the said great branch. The expression to a bounded beech standing by the said great branch, coupled with the next expression, "then into the woods N E and by N 220 perches, to a bounded red oak," and both combined with the words in the first course, "then bounding on the said great branch running W N W 40 perches," and it appearing also by the grant, that when the surveyor left the river, he calls for a tree at the end of every course, indicate plainly the intention to have been to run all the subsequent

(a) *Kilgour*, A. J. concurred. *Ridgely* A. J. did not sit.

JUNE 1821.

Hammond
vs
Ridgely

CHASE, Ch. J. The court are of opinion, that between the same parties and those claiming under them, the judgment of the court of appeals on the same question of law is conclusive. But *Richard Ridgely*, the lessor of the plaintiff in the present suit, was not a party in the former suit of *Daniel Dorsey's* lessee against *Rezin Hammond*. It having been entered on the docket for the use of *Richard Ridgely*, does not make him the party. The legal estate vested in *Daniel Dorsey*, the mortgagee, under the mortgage from *Richard Ridgely*, on payment of the mortgage money, and executing the release from *Daniel Dorsey* to *Richard Ridgely*, he was in of his former estate by a title paramount to that of *Daniel Dorsey*. *Richard Ridgely* had only an equity of redemption until the mortgage money was paid. No acts of the mortgagee could affect his equitable right, or diminish his interest. A *cestui que trust* cannot bring an ejectment. The entry on the docket, that it was for *Richard Ridgely's* use, cannot make him the party, or conclude him on the question of law decided in the case of *Daniel Dorsey's* lessee against *Rezin Hammond*; and his having had the conduct of the suit, because he had the equity of redemption in the land, could not make him the party in contemplation of law, or conclude him by the decision of the court of appeals in the case referred to.

It is the province of the court to decide on the construction of grants, except in the single instance of a latent ambiguity.

It is the unquestionable right and province of the court to decide on the construction of grants, as well as to the thing granted, as to the nature and quality of the estate which passes by it, except in the single instance of a latent ambiguity.

The construction of a grant is to be made according to the intention of the parties to be collected from the words and expressions contained therein.

The construction of the grant is to be made according to the intention of the parties, to be collected from the words and expressions contained in the grant, if such intention is not inconsistent with some rule or principle of law.

courses on the great branch to the beech. If there is not satisfactory proof of the beech, or the place where it stood, then the course N and by E 16 perches must terminate by the great branch.

Magruder and Stephen, for the plaintiff.

T. B. Dorsey and Bowie, for the defendant.

In doubtful cases, that exposition is to be given which is most beneficial for the grantee; and pursuant to that principle, the preference was given to calls originally, because generally, the location by calls gave the grantee more land than the location according to course and distance. Almost every grant that has calls, as well as courses and distances, is susceptible of a double location, because the call, and the course and distance, seldom, if ever, precisely agree.

JUNE 1821

Hammond
vs
Ridgely

In doubtful cases that exposition is to be given which is most beneficial to the grantee

If the call is imperative or peremptory, in the judgment of the court, it must be complied with, and the course and distance rejected, if they do not correspond with the call.

If the call is not imperative, or cannot be proved, the location must be according to course and distance.

In all ejectments, in which the controversy is about the location of the land, the land must be located according to the different views or pretensions of the contending parties, and to support these locations, the evidence is introduced on which the questions of law arise as to the true location of the land, which must conform to the true exposition of the grant.

Calls in grants, if imperative, must be complied with, and the course and distance rejected, if they do not correspond with the call. If the call is not imperative, or cannot be proved, then the location of the land must be according to the course and distance. When the controversy is, as to the location of the land, it must be located on the plots, by the parties, and to support such locations, the evidence produced must conform to the true exposition of the grant.

A latent ambiguity, is an ambiguity concealed, or not apparent on the face or inspection of the grant, but is created by the introduction of parol evidence, showing that the grantor, for instance, had two tracts of land called *Black Acre*, the name of the land granted; parol evidence is admissible to show, for the purpose of explaining and removing the ambiguity, which tract of land was intended to pass, and the finding of the jury will give effect and operation to the grant, by ascertaining which tract passed. In this way the right of expounding the grant, and locating the land according to such exposition, devolves on the jury, and is rightfully vested in them.

Parol evidence is introduced where there is a latent ambiguity, not apparent on the face of the grant, as where the grantor had two tracts of land called B, or if a tree is called for, and there are two trees set up as the call, &c

So in the case of a call for the head of a creek called *Swan Creek*, and there are two creeks of that name; and so if there are two places set up as the head of *Swan Creek*—the jury are to determine in the first case according to the evidence, which creek was intended, and in the second, which place is the head of the creek.

So if a tree is called for, and there are two trees set up as the call; and so if the line of a tract of land is called for, and there are two tracts of that name—the jury are

JUNE 1821. to decide which is the tree intended, and which is the tract of land intended, and at what part of the line the intersection was. All these are instances of a latent ambiguity, and of locations with a double aspect. Many other instances could be enumerated, but these will suffice to show the ideas of the court of a latent ambiguity.

Hammond
vs
Ridgely

These principles and positions being laid down, which the court consider as incontrovertible, will guide the court to a right decision of the question now submitted to them by the prayer made by the counsel for the plaintiff, for their direction to the jury, as to the true construction of the grant of the land called *Dryer's Inheritance*.

A tract of land described in a grant as running sundry courses to bounded trees, "then N 66 deg. E 120 ps. to a bounded white oak standing by the river, then bounding on the said river running S 5 deg. E 270 ps. then by a straight line to the first bounded tree." The last course was held to run a straight line, and not to bind with the river to the beginning

What is the plain intent and meaning of the parties, to be collected from the words of the grant, "beginning at a bounded red oak standing by the said branch of *Patuxent* river, and running N 62° W 86 ps. to a bounded red oak in a branch, then N 6° W 562 ps. to a bounded white oak, then N 66° E 120 ps. to a bounded white oak standing by said river, then bounding on the said river, running S 5° E 270 ps. then by a straight line to the first bounded tree?" The beginning, the first, second, third and fourth courses, are all admitted as exhibited and delineated on the plots, and the *Patuxent* river, as located, the place where the fourth line terminates on the river, to be found by the jury, expending the number of perches on the meanders of the said river. The only contest is about the running of the fifth and last course, which closes the survey, "then by a straight line to the first bounded tree." This expression appears to be plain and free from doubt, and every person of good understanding, unaccustomed to the subtle and refined reasonings of ingenious men of the profession, would say, without hesitation, that the intention was to run directly by a straight line from the termination of the fourth line at the river, to the beginning, and not circuitously with the windings of the river. Why? Because a straight line is not a crooked one, and a line from one given point to another must be a straight one; and because the fifth course is a distinct sentence, and because there is no expression in it that has a call for the river, or any reference to it; and because the intention is to be collected from the words of the grant, and nothing extrinsic or *de hors* the grant, can be resorted to in the construction of it, and because it is an imperative call from the end of the fourth line, run

bing the said fourth line 270 perches with the meanders of the river, and from thence to the first bounded tree, admitted to be the beginning, by a straight line, and because, if the surveyor had intended to bind on the river, he would have said, then with the river to the beginning.

Hammond
vs
Ridgely

The court are of opinion, that the fifth course, "then by a straight line to the first bounded tree," admitted to be the beginning, excludes all doubt, is an imperative call, and must be gratified, and must run from the termination of the fourth line, (the place to be ascertained by the jury,) by a straight line to the beginning, and not with the windings and meanders of the river, but binding on the said straight line. The defendant excepted.

2. The plaintiff then prayed the opinion of the court, and their direction to the jury, that according to the true construction of the grant of *Dorsey's Search*, (the original,) the first line thereof is to be located binding on the *Patuxent* river, and all the subsequent courses are to be run according to their course and distance, until you come to the N 1° W 48 perches course. But the defendant objected to the court's giving the direction as prayed for; and prayed the opinion of the court, and their direction to the jury, that according to the true grammatical construction and evident meaning of the expressions used in the grant of *Dorsey's Search*, the original, that tract, from its beginning at figures 90, to its second boundary at figures 91, ought to bind on the said river, and not extend over the river to the westward thereof, so as to include any land on the west side thereof; and that the expressions, "and bounding on the said river," were not in construction to be confined to the first course, but related to the whole of the courses mentioned, which are stated to be run from the beginning to the second tree by the river side. And further prayed the opinion of the court, and their direction to the jury, that it appearing from the evidence that the plaintiff and defendant agree as to the location of the river *Patuxent*, and of the beginning of *Dorsey's Search*, the original, at the figures 90, also of the next boundary called for in the grant at the figures 91, and only differ as to the manner in which the said tract ought to run and bind from the beginning at 90, to where the other boundary stood at 91; that from the grant itself it cannot be known, whether a

Where a tract of land, described as beginning at a tree standing by a river, and running and bounding on the said river N 4 degs. E 87 perches, then N &c sundry courses, then N 1 deg. W 48 perches to a bound oak by the river— It was held, that all the subsequent courses, after the first, were to be run according to course and distance, until the course N 1 deg. W 48 perches

JUNE 1821.

Hammond
vs
Ridgely.

location of the said tract, running and bounding from the beginning at 90 to the boundary at 91, according to the courses and distances expressed in the grant, will differ from a location binding on the said river from the one boundary to the other, but that this difference can only be discovered by extrinsic evidence. That the clause in the grant, describing how the land is to run from the beginning to that boundary, which is in the following words, to wit. "and running and bounding on said river N 4° E 87 perches, then N 62° E 50 perches, then N 21° E 107 perches, then N 8° E 62 perches, then N 20° W 45 perches, then N 37° E 40 perches, then N 26° W 32 perches, then N 1° W 48 perches to a bounded white oak by the river," may mean, and can be construed according to their true and grammatical construction, that these courses and distances should be run from one boundary to the other, but that the land should bind with the course of the river from the one to the other. That this clause is elliptical, and the expressions "running and binding with the river," may be understood and supplied before each of the courses there mentioned. That the expressions "binding with the river," though placed in the beginning of this clause before the first course, yet the clause may be construed in the same manner, and may have the same meaning, as if those words had been placed at the end of that clause after the last course, and that there is nothing on the face of the grant which proves that such was not the meaning of the parties.

CHASE, Ch. J. The court, upon the prayers submitted to them, direct the jury, that although plots are necessary to show the position of the land, and the calls referred to in the grant, and evidence out of the grant is necessary to show their respective situations, yet not to aid in the construction of the grant, except in the case of a latent ambiguity. That the true construction of the grant of *Dorsey's Search*, according to the words and expressions therein, is to run the first course N 4° E 87 perches binding on the river, and all the subsequent courses according to the course and distance, until you come to the N 1° W 48 perches.

This construction is conformable to the plain meaning of the words, and gratifies every part of the grant, and is

pursuant to the intention of the surveyor, to be collected, from the words he has used, 'The construction contended for rejects all the courses subsequent to the first, and cannot be admitted, there being no call or binding expression in either of the courses.

JUNE 1821.

Hammond
vs
Ridgely

The grant of *Robin Hood's Forest* differs from the grant of *Dorsey's Search*; the words, "then into the woods, N E and by N 220 perches to a bounded red oak," are omitted in *Dorsey's Search*, nor are words of similar import inserted. That expression, combined with the other circumstances mentioned, in the opinion of the court, in the case of *Charles Duvall* against *Nathan Jones*, indicated the intention of the surveyor to make the great branch of *Patuxent* river the boundary from the second boundary at the letter E to the beech, because an intention was manifested by all the expressions and circumstances before alluded to, and contained in the grant, not to depart from the river until the surveyor came to the beech, and so contended by the counsel. The court decided on the words of the grant, and did not resort to extraneous circumstances. Reject that expression, and the decision of the court would have been different.

It has been contended in the case of *Dorsey's Search*, that the words "running and bounding," ought to be supplied and made adjuncts or adherent to every distinct course, and that such is the grammatical construction. I admit it as to the word *running*, but not as to the word *bounding*. The word *running* is necessarily implied, because the surveyor could not locate the lines without running according to course and distance or calls, but *bounding* is not a necessary implication, nor is it the grammatical construction in this case to unite it to every subsequent course, because, as a figure of rhetoric, it ought not to make the surveyor certify what is not consistent with truth, and therefore it ought not to be supplied. The first course of *Dorsey's Search* is, "running and bounding on the said river," about which there is no dispute. The second course is N 62° E 50 perches, which is the course running almost directly from the river. If the surveyor does certify what is not true, by certifying course and distance and calls, and they do not agree, that is his own act; but he ought not to be made to certify what is not true by implication. It has been contended, that the word *then* is

JUNE 1821.

Hammond
vs
Ridgely

a copulative, and makes every course bind on the river. It means "afterwards," "immediately afterwards" or "at that time," and such is its meaning in all surveys; that is, as soon as the surveyor came to the termination of one line he commenced running the next.

I have pronounced my opinion of that which I consider the true construction of *Dorsey's Search*. If I am mistaken, I derive great satisfaction from knowing my errors will be corrected by a superior tribunal. I can truly say I have taken pains to form a right judgment. The defendant excepted.

A grant of a tract of land, described as beginning at three bounded white oaks standing by the river P, and running & bounding on said river N. 87 prs. then N. 80 prs. then, &c. sundry courses, then N. 48 prs. to a bound white oak by the river, then S 388 prs. to a bound white oak, then by a straight line to first bounded white oaks—must be run from the beginning to the nearest part of the river P, to be ascertained by the jury, and from thence N 87 prs. with the meanders of the river, expending the number of perches thereon, and from thence the subsequent courses, according to the course and distance, (the jury to allow for the variation of the compass), until the course N 48 prs. then, N 48 prs. to a bounded white oak by the river, then S 388 prs. to a bounded white oak, (the two last oaks being admitted) then by a straight line to the first bounded white oaks

A grant of another tract of land, stated as beginning at a bounded red oak standing by a branch, and running N 66 prs. to a bound red oak in a branch, then N 362 prs. to a bound white oak, then N 120 prs. to a bound white oak standing by the river P, then bounding on the said river, and running S 270 prs. then by a straight line to the first bounded tree—Must be located to run from the beginning, N 86 prs. to a bound red oak in a branch, then N 362 prs. to a bound white oak, then N 120 prs. to a bound white oak standing by the river P, then to the nearest part of the river, to be ascertained by the jury, then bounding on the river, and running with the meanders thereof, S 270 prs. then by a straight line to the first bounded tree, binding on the said straight line.

3. The defendant then proved by the plots and explanations, and by the surveyor who made them out, that the line from the figures 90, the beginning of *Dorsey's Search*, (the original,) to the figures 57, marked on said plots by the river side, is S 65° 15' W 15½ perches in length, and that the figures 56 stand where 87 perches terminates, running the same from the figures 57, by and with the meanders of the river, and expending them on the meanders, instead of running a straight line of 87 perches in length from the figures 90. That the course and distance from the figures 90 to the red figure 1, by the side of the river, is N 35° W 25 perches, and that *Dorsey's Search* is located to red figure 2 by running 62 perches from the red figure 1, binding them on and with the meanders of the river and expending them on the meanders, and not by running a straight line of 87 perches, either from red figure 1 or from figures 90. And also that from figures 90 to the red figure 4 by the river side, the line is N 1° 15' W 136 perches. And further proved, that the plaintiff has located the fourth line of *Dryer's Inheritance* by running it from the post at figures 14 and 15, and running the 270 perches by and with the meanders of the said river, and expending them on said meanders, and thus terminating them at the figures 58 by the river side, instead of running a straight line of 270 perches in length to the river side. The de-

defendant then prayed the court to direct the jury, thatt he lo- JUNE 1821.
 cations made by the plaintiff of *Dorsey's Search*, the ori-
 ginal, as located on the plots, are not either of them war-
 ranted by, or agreeable to the true meaning of the grant of
 that tract. And also that the locations of *Dryer's Inherit-*
ance made by the plaintiff on the plots, are not either of
 them warranted by, nor agreeable, to the meaning of the
 grant of *Dryer's Inheritance*.

Hammond
 vs
 Ridgely

CHASE, Ch. J. The court are of opinion, that the true construction of the grant of *Dorsey's Search*, according to the words and expressions therein, is to run from the beginning to the nearest part of *Patuxent* river, to be ascertained by the jury according to the evidence, and from thence N 4° E 87 perches with the meanders of the river, expending the number of perches on the same, and from thence the subsequent courses according to the course and distance, (the jury making such allowance for the variation of the compass as may accord with the evidence,) until you come to the course N 1° W 48 perches, then N 1° W 48 perches to a bounded white oak by the river, then S 47° E 388 perches to a bounded white oak, (the two last oaks admitted by the parties,) then by a straight line to the first bounded white oaks.

And the court are also of opinion, that the true construction of the grant of *Dryer's Inheritance* is to run from the beginning, admitted by the parties, N 62° W 86 perches to a bounded red oak in a branch, then N 6° W 362 perches to a bound white oak, then N 66° E 120 perches to a bound white oak standing by the river, then to the nearest part of the river, to be ascertained by the jury according to evidence, then bounding on the river and running with the meanders thereof, S 5° E 270 perches, then by a straight line to the first bounded tree binding on said straight line. The defendant excepted.

4. The defendant then offered in evidence an agreement entered into in this cause, stating that when *Dorsey's Search*, the resurvey, was made, and for some time before, and thereafter until 1726, the river *Patuxent* was the boundary between *Baltimore* and *Anne-Arundel* counties; *Baltimore* county on the eastern side, and *Anne-Arundel* county on the western side of that river. And to prove the authority given to the deputy surveyors by their commissi-

a certificate of survey, made by the surveyor of B county, includes land lying in A A county, a grant, on a caveat, would be refused for the land in A A county. But if a grant was obtained, and there was no fraud in its obtention, it will operate to pass the land

JUNE 1821.

Hammond
vs
Ridgely

ons, and the authority given to *John Dorsey*, who was the deputy surveyor of *Baltimore* county when the resurvey on *Dorsey's Search* was made, and who made the said resurvey [for *John Dorsey, jun.*] the defendant offered in evidence the original record of the proceedings of the council, and of the commission granted to *Richard Beard*, [who made the survey of *Dorsey's Search*, the original,] on the 1st of December 1684, and of the commission to *George Noble* on the 8th of February 1733. The commission to *Beard* constituted and appointed him deputy surveyor of *Anne-Arundel* county, and that to *Noble* constituted and appointed him deputy surveyor of *Prince-George's* county, granting to them respectively, full power and authority to survey and resurvey lands within their respective counties; and in the commission to *Noble* he was restricted to surveys within the limits and bounds thereby assigned to him and to conform to orders and instructions, &c. The defendant also offered in evidence, that commissions also issued to *Thomas White*, of *Baltimore* county, dated the 4th of March 1733; *William Hanson*, of *Charles* county, dated the 7th of March 1733; *Robert Elliott*, of *Saint Mary's* county, dated the 7th March 1733, and *Henry Ridgely*, of *Anne-Arundel* county, dated the 15th March 1733; all which issued to them as deputy surveyors of the said respective counties, and are in the same form *mutatis mutandis* with the said commission granted to *George Noble*. The defendant also offered in evidence the instructions of the Lord Proprietor to regulate the conduct of his officers as to the manner of laying out and granting his lands. See them set forth in *Kilty's Land Holders Assistant*, 284, &c. The defendant also offered in evidence the warrant of resurvey to resurvey *Dorsey's Search*, granted to *John Dorsey, junior*, of *Baltimore* county, the 26th of January 1722, in which warrant that tract is stated by the petitioner for the warrant to lie in *Baltimore* county. The defendant also offered evidence that all warrants of resurvey to resurvey any tract or tracts of land were always directed to the deputy surveyors of the county or counties in which the tract or tracts to be resurveyed did lie. The defendant also offered in evidence, the commissions granted to *Vincent Lowe*, surveyor general of the former province of *Maryland* on the 12th of August 1685; and the commission granted to *Thomas Bordley*, surveyor

general for the *Western Shore* of the said province, on the JUNE 1821. 20th of May 1717. These commissions authorised respectively the appointment of deputies, &c. The defendant further offered evidence, that the proceedings of the council at the time when the said *John Dorsey* was appointed deputy surveyor of *Baltimore*, are lost or destroyed. The defendant then prayed the opinion of the court, and their direction to the jury, that the plaintiff could not be entitled by the certificate of *Dorsey's Search*, the resurvey, and the grant thereon, to claim any land which was situate on the west side of the river *Patuxent*, and in *Anne-Arundel* county.

Hammond
vs
Biddely

CHASE, Ch. J. The court are of opinion, that the deputy surveyor had no authority to act beyond the limits of the county of which he was appointed surveyor, and on the return of the certificate it would have been cause, on a caveat in the land office, to refuse a grant for that part of the land which lay in *Anne-Arundel* county. But the grant having been obtained, and no fraud practised in the obtention of it, will operate to pass the land in *Anne-Arundel* county. The defendant excepted.

5. The plaintiff having given in evidence the title deduced by the defendant in *Dryer's Inheritance*, and *Hammond's Inheritance*, then gave in evidence, by the debt books of the late Lord Proprietor, that *John Dorsey*, the devisee of *John Dorsey*, the grantee of *Dorsey's Search*, (the original,) and those deriving title and claiming under him, always paid the quit rents upon the whole of *Dorsey's Search*, (the original,) and *Dorsey's Search*, (the resurvey,) from the year 1754 to 1774, that being the whole period embraced by said debt books, and that no quit rent was ever paid on any part of *Dorsey's Search*, (the original,) or *Dorsey's Search*, (the resurvey,) or either of them, by any other person or persons whatsoever, except *John Dorsey*, the devisee, *Ely Dorsey*, and the devisees of the last mentioned *John Dorsey*. And further gave in evidence the following entry on the rent rolls, viz. "479 acres 19 2 rent. *Dorsey's Search*, sur. 6th Decem. 1694, for *John Dorsey*, on *Elk Ridge*, beg. at 3 bound white oaks. Included in resurvey of *Dorsey's Search* in *Anne-Arundel* county." And further offered evidence, that *Elizabeth* same land, the one by title, and the other by wrong, it is his possession who has the right,

Where a tract of land was granted to A in 1694, & an adjoining tract was granted to B in 1695, and B entered upon a part of A's land, and it was possessed, used, and occupied by B, and those claiming under him, for upwards of 100 years, a conveyance will not be presumed from A to B for the land so possessed, nor that there had been an actual ouster of such part. But if B and those claiming under him, were in the adversary, uninterrupted, and exclusive possession, by enclosure, of the land in dispute, for 20 years, in such case A will be barred by the act of limitations. He who has title to a tract of land and is in possession of part, is in possession of the whole; and if two persons are in possession of the

JUNE 1821. *Dorsey*, the widow of *John Dorsey*, the grantee of *Dorsey's Search*, (the resurvey,) and mother of *Ely Dorsey*, departed this life in the year 1777. The defendant then prayed the court to direct the jury, that upon the whole evidence so given to them as stated in the several bills of exceptions, if they believe the same, they ought to find that *John Dorsey*, the grantee of *Dorsey's Search*, the original, did in his life-time convey to *Samuel Dryer* all that part of *Dorsey's Search*, the original, on the west side of *Patuxent* river, which is included within and bounded by the said river, and the lines of *Dryer's Inheritance*; or that the said *John Dorsey* was actually ousted of all that part of *Dorsey's Search* by *Dryer*; and that upon the said evidence the defendant is entitled to their verdict.

Hammond
v.
Ridgely

CHASE, Ch. J. The court have no doubt about the law as to the right of the court to instruct the jury to presume grants and deeds in cases where there is a proper and legal foundation laid for the presumption of the jury, and the courts have frequently so decided, but that law is not applicable to this case.

This is a case of conflicting grants and interfering locations, and the question between the parties depends on what is the true location of *Dorsey's Search*, and *Dryer's Inheritance*, and the court have already decided that question, and according to the opinion of the court the land in controversy is included within the limits of *Dorsey's Search*.

It is a principle of law, that he who has title to a tract of land, and is in possession of part, is in possession of the whole. A person holding land cannot occupy and use every part of his land, nor can he have every part under fence.

It is a principle of law, that if two persons are in possession of the same land, the one by title, and the other by wrong, it is his possession who has the right.

These principles are not only established by the decisions of the courts, and acquiesced in, but are founded in justice and general convenience, favour right, and resist wrong and oppression.

When *Dryer* entered on the land in dispute, and made improvements, he entered on it as *Dryer's Inheritance*, claiming it as such; there is no evidence that he claimed it

by deed from, or any contract with, *John Dorsey*, the grantee, nor is there any evidence that those claiming under *Dryer* claimed it otherwise than as part of *Dryer's Inheritance*, but that they possessed it as such, supported that possession *manu forte*, and resisted all attempts by those claiming under *Dorsey* to recover the possession. *Dorsey*, the grantee of *Dorsey's Search*, and those claiming under him, having the right to that tract, and being in possession of part, their possession pervaded the whole land, and was co-extensive with its limits.

JUNE 1821.
 Hammond
 vs
 Ridgely

The court are of opinion, that the evidence in this case will not warrant the court to direct the jury to presume a deed from *John Dorsey*, the grantee of *Dorsey's Search*, to *Samuel Dryer*, the grantee of *Dryer's Inheritance*, and refuse to give the direction prayed.

The court are also of opinion, that the entry and possession of *Samuel Dryer* on the part of *Dorsey's Search* in dispute, were tortious; and if the jury find from the evidence that he and those claiming under him were in the adversary, uninterrupted and exclusive possession, by enclosures, of the land in dispute, for twenty years, that in such case the plaintiff will be barred of his recovery by the act of limitations, and if not in possession of the whole land in dispute, to the extent of such possession. The defendant excepted.

6. The defendant then prayed the court to direct the jury, that by the will of *John Dorsey*, the eldest, if his *Patuxent* plantation was on the east side of the river, his grandson, *John Dorsey*, could not take any land on the west side of *Patuxent* river. Also, that if they believe that at the time of the deeds executed by *Deborah Dorsey* and by *Henry Woodward Dorsey* to *Richard Ridgely*, the grantors and the said grantee were out of possession of the land on the west side of the river, and that the same was at that time in the adverse possession of the defendant or those under whom she claims, nothing passed by those deeds, and that the legal title of the said land for which the ejectment is brought yet remains in *Daniel Dorsey*.

A devise of a tract of land by name, and described as lying in B county, passed the whole tract, although part of it lay in A county.

If the grantor in a deed is in possession of part of the tract of land conveyed, that possession will extend to the whole tract, unless there had been an adversary, uninterrupted and exclusive possession by enclosures of a part of the land by some other person for 20 years prior to the execution of such deed.

CHASE, Ch. J. The court are of opinion that the whole of the land called *Dorsey's Search*, passed by the will of *John Dorsey* to his grandson, *John Dorsey*, as well that

JUNE 1821. part lying on the west side of *Patuxent* river, as that lying on the east side of said river.

Hammond
vs
Ridgely

The court are also of opinion, that if the jury find that *Deborah Dorsey* and *Henry Woodward Dorsey*, the grantors in the deeds to *Richard Ridgely*, were in the possession of part of the land of *Dorsey's Search*, that possession will extend to the whole and every part of said land, and that the said deeds will operate to transfer the whole of said land to *Richard Ridgely*, unless the jury shall find an adversary, uninterrupted and exclusive possession, by enclosures, of part of said land by the defendant, and those under whom she claims, twenty years prior to the making and executing said deeds; and in case the jury shall find that the defendant, and those under whom she claims, had such adversary possession, in such case the said part will not pass by the said deeds to *Richard Ridgely*. The defendant excepted; and the verdict and judgment being for the plaintiff, she appealed to this court (a).

(a) The trial of this cause in the county court took up much time, and the several questions which arose were greatly contested by *Magruder* and *T. B. Dorsey* for the plaintiff, and by *Martin*, (Attorney-General,) and *Bowie* for the defendant. The counsel for the plaintiff, in their arguments on the points raised on the first bill of exceptions, cited *Norwood vs. Carroll, et al lessee, (Ante 155.) Ridgely, et ux. lessee, vs. Norwood, 1 Harr & Johns. 128. 1 Phillips' Evid. 410, 416 2 Bac. Ab 439, 649. 2 Selw. N. P. 780, 781 Chew's lessee vs Weems, 1 Harr & M-Hen. 463* And on the question raised in the fifth bill of exceptions, they cited *Davidson's lessee vs. Beatty. 3 Harr. & M-Hen. 621, and Cheney vs. Ringgold, et al. lessee, 2 Harr. & Johns. 87.*

The defendants counsel, in their arguments as to the questions in the first bill of exceptions, cited the act of 1790, ch 42. *Good-right vs. Welch. 3 Wils. 23 1 Madd Chan Pref. viii. Dorsey's lessee vs. Hammond, 1 Harr & Johns. 190. Calhoun & Roger, lessee vs. Hall, 2 Harr & M-Hen. 416. Mageehan vs Adams, 2 Binny, 109. Thompson et al lessee vs. Brown, 1 Harr. & Johns. 335 Durall vs Jones, (Ante 253 note) Keech's lessee vs Dansey, 1 Harr & M-Hen. 20 Drwellin's lessee vs. Fendall & Simmes, Ibid 242. Hamilton's lessee vs. Cawood & Blacklock, 3 Harr & M-Hen 437. Snowden & Jennings vs Jones, (in the land office.) Martin's lessee vs. Muse. (E. S. general court) Helms' lessee vs. Howard, 2 Harr & M-Hen. 84. Davis's lessee vs Batty, 1 Harr. & Johns 264. Smith's lessee vs Volgamot & White, 2 Harr. & M-Hen 155. Beltzhoover vs. Rench, (December 1814.) Ashton vs Hammond, Land Hold Ass 407. And on the question in the fifth bill of exceptions they cited *Bull. N. P 103. Stra 1142. Cowp. 214, 217, 102. Ld Raym. 830. 12 Mod 658, 659. Ball. on Stat. ch 2. 12 Ves. 250, 255. Phil. Evid. 119, 120. 1 T. R. 431, 432, (notes.) 1 Bos & Pull. 399, 400, 401. 3 East, 298. 3 Saund. 175, (notes) 3 T R. 151. 7 T. R. 492. 11 East, 488. 6 East, 212. 4 Burr. 1963. 1 Pow. on Cont. 309.**

The cause was argued before BUCHANAN, EARLE, JUNE 1821.
MARTIN and DORSEY, J. (a), by

Hammond
vs
Ridgely

Pinkney and Winder, for the appellant, and by

Taney, Magruder and T. B. Dorsey, for the appellee.

The points raised by the counsel in their arguments, being fully stated by the judges in the opinions delivered by them, it is deemed unnecessary to notice them here, or the authorities to which they referred.

BUCHANAN, J. This suit was instituted in the county court of *Anne-Arundel*, for two tracts of land, called *Dorsey's Search*, one a resurvey on the other; and comes before us on six separate bills of exceptions, the four last of which, have been properly abandoned by the counsel for the appellant, the opinion of the court below contained in each of them, being clearly right.

A former ejectment had been brought in the late general court, on the demise of *Daniel Dorsey*, for the same lands, against *Rezin Hammond*, under whom the appellant claims, which was marked on the docket to be for the use of *Richard Ridgely*, the lessor of the plaintiff below in this case, and under whom *Daniel Dorsey* claimed as mortgagee. In that case, as in this, defence was taken for a tract of land called *Dryer's Inheritance*, which being an elder tract of land than *Dorsey's Search*, (the resurvey,) it became important in the progress of the trial of the former suit, (as also of this,) to ascertain the true location of the tracts of land called *Dryer's Inheritance* and *Dorsey's Search*, (the original,) which depended on the construction to be given to the respective patents. And the general court adopting the principle, that it is the peculiar province of courts to expound all grants, except in the case only of a latent ambiguity, instructed the jury that the fifth or last line of *Dryer's Inheritance* could only be correctly located, by running a straight course from the end of the fourth line, to the beginning. And that according to the true and proper construction of *Dorsey's Search*, the first line should be run binding on the river *Patuxent*,

(a) CHASE, Ch. J. having decided the case in the county court, and JOHNSON, J. having been concerned as counsel for the defendant in the former action, did not sit.

JUNE 1821. and the eight following lines, according to the courses and distances expressed in the certificate and grant, and not to bind on the river *Patuxent*; and the jury gave a verdict for the plaintiff accordingly.

Hammond
vs
Ridgely

The case was taken to the former court of appeals on bills of exceptions, and that court assuming it as a principle, that in all cases of ambiguity arising on the face of a certificate or grant, as to the location of a tract of land, the jury is the proper tribunal to decide the fact of location on evidence *de hors* the instrument, reversed the judgment of the general court, and sent the cause back by *procedendo*, and on a new trial the defendant got a verdict; which presents first, the question, whether that opinion of the court of appeals is binding and conclusive on this court?

It is readily admitted that no argument in support of the negative of the question can be drawn from the circumstance, that that court is not now in existence; and that if it would have been binding on that court, in a subsequent suit brought for the same land, and depending on the same evidences of title, it is equally binding on this, and should be examined without reference to the abolition of that tribunal.


The original constitution of this state, in distributing the powers of the government, provides by the 56th article, "that there shall be a court of appeals, composed of persons of integrity and sound judgment in the law, whose judgment shall be final and conclusive in all cases of appeal from the general court, court of chancery, and court of admiralty," which words, "whose judgment shall be final and conclusive in all cases of appeal," &c. are supposed to be declaratory of the quality and legal effect of a decision of the court of appeals. And it has been urged with a commanding force, that in virtue of that provision of the constitution, a decision of that court is conclusive as to the subject matter of the decision, in any subsequent suit for the same thing.

It is conceded that the expressions taken literally, are broad and comprehensive, but it seems to me, that the terms used, must be construed with reference only, to the thing intended to be created—a constitutional court of appeals—and can alone be understood to mean, that the court of appeals so provided for, should be a tribunal of ultimate re-

sort, and that there should not be created any higher court JUNE 1821.
 of appellate jurisdiction; intending only by the words, "fi- Hammond
 nal and conclusive in all cases of appeal." that no suit tak- vs
 en to the court of appeals, after being adjudicated there, Ridgely
 should be further prosecuted by appeal, to any other tribu-
 nal, that each particular case of appeal, should terminate
 and conclude with the judgment of that court; thus con-
 stitutionally guarding against the establishment by the le-
 gislature, of any other superior court of appellate jurisdic-
 tion; and not that the decision should be conclusive, as
 to the rights of the parties to the subject matter in contro-
 versy, in any other suit. And I believe the constitution
 has never heretofore been otherwise understood.

To construe it differently, and according to the literal
 import and signification of the terms used, would be to ex-
 tend their binding quality, further than would perhaps be
 seriously contended for, so far at least, as respects the ac-
 tion of ejectment. It would be to render a judgment of
 the court of appeals binding and conclusive upon all, whe-
 ther parties or strangers, for it would be difficult to prescribe
 bounds to its operation, and to exempt strangers more than
 parties, from the effect of its binding influence. Unless
 indeed, in favour of strangers, the constitution should be-
 come the creature of arbitrary will, and be made to bend
 to suit the particular case, seeing that a literal interpreta-
 tion admits of no distinction between parties and strangers;
 it is therefore binding upon all, if upon any, in any subse-
 quent suit for the same land. And yet it is a settled prin-
 ciple, that the verdict and judgment in one action of eject-
 ment, is no bar to a recovery in another, but that a party
 interested, may sue for the same land as often as he thinks
 proper; every new action of ejectment being supposed to
 be between different parties.

The act of 1790, *chapter 42*, which was also pressed
 into the argument, does not reach the question. Until the
 passage of that law, all causes that were carried to the
 court of appeals, terminated there. The judgment of that
 court, was final in each particular case of appeal, accord-
 ing to the literal provision of the constitution, and no
 further proceedings were had. And a plaintiff against
 whom an erroneous judgment had been rendered, in the
 inferior court, which was reversed in the court of appeals,
 was under the necessity of commencing *de novo*. And

JUNE 1821.  even this he could not have done, if the judgment of the court of appeals had, according to the literal sense of the terms, been final and conclusive, for that would have arrested any further proceedings. But that was never supposed, and to remedy the inconvenience of being driven to bring a new suit, the act of 1790 was passed, which directs, that in all cases in which the judgment of the general court shall be reversed by the court of appeals, on writ of error or appeal by the plaintiff, (and also in certain specified cases, where the appeal is by the defendant,) the transcript of the record shall be returned to the clerk of the general court, with a writ of *procedendo* to the judges of that court, directing them to proceed to a new trial of the cause, and that the opinion of the court of appeals shall be conclusive in law, as to the question by them decided.

Hammond
vs
Ridgely

The expressions, "and that the opinion of the court of appeals shall be conclusive in law, as to the question by them decided," are relied upon as rendering the opinion of that court, conclusive as to the right of the parties, in any subsequent suit brought for the same thing. But however comprehensive they may be abstractedly considered, when construed as they must be, with reference to the subject matter to which they are applied—to the mandate of the *procedendo*, which they may be said to accompany, they can only be understood to mean, that the opinion of the court of appeals shall be conclusive upon the judges of the general court, on the new trial of the particular suit, so sent back to them, and can have no reference to any subsequent suit.

If any thing was wanting in support of this construction, that aid might be borrowed from the act itself, which has the very same provision, in relation to cases removed to the general court from the county courts; with this further provision, "that the party against whom judgment shall be rendered by the general court, may appeal, or prosecute a writ of error to the court of appeals." Now if the expressions used, that is, "that the opinion of the general court, shall be conclusive in law, as to the question by them decided," are to be understood according to their literal import, it would be useless to appeal from the judgment of the general court, and the provision giving to the party the right to appeal is grossly absurd, since the judgment of the general court would be conclusive upon the

court of appeals, and the appeal could afford no relief, JUNE 1821. which it cannot be presumed was the intention of the legislature. Hence it would seem to follow, that the judgment of the general court, was only intended by the legislature, to be conclusive upon the judges of the county courts, on the new trial of the particular suit sent back to them by *procedendo*, and not to relate to any new or subsequent suit. And if so, as the same words, used in the same law, and applied in the same manner, must be taken to have the same meaning, the opinion of the court of appeals can only be held to be conclusive upon the judges of the general court, in the trial of the particular case sent back by *procedendo*, and no further.

Hammond
vs
Ridgely

But though the act of 1790, *chapter 42*, will not bear the construction attempted to be given to it, yet it serves to shed a ray of light on the subject, by the aid of which we are enabled to discern what was the legislative interpretation at least, of the 56th article of the constitution in the year 1790. For if under that article, a judgment of the court of appeals was held to be final and conclusive beyond the mere appeal adjudicated by them; if it was deemed conclusive of the very right to the thing in controversy, it would of course have been thought quite sufficient, to make provision only for sending cases back to the general court for new trial, without directing, "that the opinion of the court of appeals, should be conclusive in law, as to the question by them decided." Since if conclusive as to the right of the parties in another action, it would on the *procedendo* have been binding upon the judges of the general court, under the constitution, and they must have conformed to it, without that enactment. Hence it is clear, that neither the legislature, nor he who drew the law, and who was obviously acquainted with the judiciary system of the state, and the powers and practice of the courts, understood the constitution to mean, that a judgment of the court of appeals should be binding in any subsequent action, or that it should be any further final and conclusive, than as it put an end to the particular appeal in which it was given, and to all further proceedings in that suit by way of appeal. And the whole subject must have been before them, and under consideration, from the very nature of the inconvenience intended to be remedied by the writ of *procedendo*. What is said of the legis-

JUNE 1821. *Hammond vs Ridgely*. lative interpretation of the constitution, applies as well to the legal effect and operation of a judgment of the court of appeals on general principles, as a court of last resort, for if binding at all, whether by the constitution or on general principles, the provision spoken of in the act of 1790, was equally unnecessary. Nor is it believed, that there is any reason in sound policy why it should be absolutely binding. It ought indeed to be so far respected, as to secure to it, all the beneficial results of a binding quality, without its inconveniencies. It should always be approached with hesitation, and never should be lightly shaken.

Thus guarded, it stands as secure as sound policy could wish. But even if it should be admitted, that under the 56th article of the constitution, a decision of the court of appeals on the legal merits of the case, is binding as to the subject matter of that decision, in a subsequent action between the same parties or those claiming under them, for the same thing, or that independent of the constitution, that would, on general principles be the legal effect and operation of such a decision by a court of last resort; then this question presents itself, Is the opinion of the court of appeals, in the case of *Hammond* and *Dorsey* of that character? And it appears to me that it is not. No decision was made by that court upon the legal merits of the case; the question there presented, arose on the construction of two grants, as to the location proper to be made of the lands, which necessarily involved the legal rights of the respective parties, but on which, the court gave no opinion. On the contrary they declared, that "in their opinion, the expressions used in neither of the grants, were so plain and explicit as to exclude all doubt, and that they did not mean to say, in what manner either of the tracts of land ought to be located," thus declining to give any construction to either of those instruments. But assuming as a general principle, "that in all cases of ambiguity arising on the face of a certificate or grant, as to the location of a tract of land, the jury are the proper tribunal to decide the fact of location on extrinsic evidence," they reversed the judgment of the general court, without determining whether the construction given to the grants by that tribunal, was right or wrong; leaving the question of law, as to the true and proper construction of the grants, entirely open and undecided, and referring

to a jury, (as it would seem,) not the construction of the grants, (for they have not said that that was a matter proper to be left to a jury,) but the fact of the original running or location, separate from, and independent of the grant. So that in point of fact, no construction has ever been given to the language of those grants, either by the court of appeals, or by a jury. All that was in reality done by the court of appeals, was to refuse to decide the questions of law submitted to them, and to send the case back to be decided by a jury on a different question, a question of fact, out of the grants. And to give to the refusal of that court, to expound the grants in question, the effect to preclude all other courts from doing so, would be to make a verdict of a jury, on a fact of location, distinct from the expressions of the grants, binding and conclusive on the rights of the parties in any subsequent ejectment for the same land; a property not legitimately belonging to verdicts in actions of ejectment.

JUNE 1821.

Hammond
vs
Ridgely

But if the opinion of the court of appeals can be understood, as casting the construction of the grants of *Dryer's Inheritance* and *Dorsey's Search* on the jury, it is merely an opinion on a question of jurisdiction; an opinion that it was a matter fit to be left to a jury, and not a decision on the legal effect and operation of the grants, not a judgment pronounced on the legal merits of the parties. And with all the deference due to the constitution of that tribunal, and to the character and standing of the individuals who compose it, I do not think it binding upon this court. Nor is it fit that it should be; the principle on which the opinion is expressly founded, is denied to be law, and has since been solemnly overruled in several cases; and if the opinion, the principle of which has been so ruled to be erroneous, stands at all, it must stand without legs; and they who claim under it, must hold contrary to the acknowledged law of the state, and the established rule for the exposition of all other grants. And thus there would be two received rules for the construction of grants, one governing *Dryer's Inheritance* and *Dorsey's Search*, and the other applicable to, and pervading all other grants; the two rules altogether inconsistent with, and repugnant to each other, and yet each of them equally available in the courts of law of this state.

JUNE 1821.

Hammond
vs
Ridgely

But I cannot perceive why, on any principle either of law or policy, an opinion of any court should be deemed of binding authority, when the foundation of that opinion is taken away. It is the principle that should govern, the substance and not the shadow. Sound policy does indeed require, that principles laid down, and acted upon by courts of last resort, should not be lightly shaken, as it is to established principles, and not to isolated opinions, that parties look in making their contracts. But when the assumed principle of an opinion in any case has been annulled, the opinion should fall with it, and the subject matter be made to rest upon the settled rule governing all other like cases.

It cannot be denied, that *Richard Ridgely*, the lessor of the plaintiff below, was substantially a party in the case of *Hammond* and *Dorsey*, but as neither the opinion of the court of appeals, nor the verdict and judgment in that case, can be relied upon by way of estoppel, (which certainly has nothing to do with the case as it is presented,) it is unnecessary to go into any examination of that doctrine. This case then, I think, stands altogether unaffected by that of *Hammond* and *Dorsey*; and as it has been ruled by this court, in several recent cases, and particularly in the case of *Pennington vs. Bordley's Lessee*, at June term 1819, that the construction of a grant, falls peculiarly within the province of the court, and is not a matter fit to be left to a jury, except only in a case of latent ambiguity, the construction proper to be given to the grants of *Dryer's Inheritance* and *Dorsey's Search*, remains only to be examined.

As to *Dryer's Inheritance* the only difficulty is, in determining how any doubt could ever have existed; for if one grant can be more clear and explicit, and more free from ambiguity than another, it is the grant for *Dryer's Inheritance*, in the description of the fifth or last line, which forms the subject of controversy. The expressions are, "then," (that is from the end of the fourth line,) "by a straight line to the first bounded tree," which must and can only be located, by running a straight course from the end of the fourth line, wherever that may be, to the beginning tree; and the meanders of the river *Patuxent*, as contended for, cannot be pursued without a direct violation of the grant. With respect to *Dorsey's Search*, if

there is any ambiguity, it is clearly patent, and falls with- JUNE 1821.
 in the rule established in the case of *Pennington and*
Bordley. But if the grant alone is looked to, without re- Hammond
vs
Ridgely
 course to extrinsic matter, there will be found no difficulty
 in expounding it, and it is only by resorting to matter *de*
hors the grant, to contradict, and not to explain it, that
 any difficulty has been produced.

By inserting the word "running," immediately after the
 word "then," at the beginning of each line, the sense is
 made complete, and every word in the grant will be gra-
 tified; and it is not proper that any thing more should be
 understood, than that which is necessary to perfect the
 sense. The words, "and bounding on the said river,"
 cannot be introduced without evident risk to one half of
 the description given in the grant; for if in point of fact,
 the meanders of the river do not correspond with the
 courses expressed in the grant, to adopt the words, "and
 bounding on the said river," (as is insisted on,) would be
 to reject the courses altogether, since under the authority
 of a long course of decisions by the courts of this state,
 the binding call on the river so adopted would be peremp-
 tory; and thus by arbitrarily adopting what is not necessa-
 ry to perfect the sense, that would be defeated which is
 plainly expressed in the grant, the description by courses
 and distances. I agree therefore in opinion with the judge
 before whom the cause was tried on each exception, and
 think that the judgment ought to be affirmed.

EARLE, J. There are several exceptions in the record of
 this case, brought up by the appellant, the defendant, in
 the court below. The arguments of her counsel have a
 bearing on the three first only, and the rest, it seems to be
 admitted by them, are correct decisions, and ought to be
 affirmed.

In the first exception the county court decided, that be-
 tween the same parties, and those claiming under them,
 the judgment of the court of appeals, on the same question
 of law, is conclusive, but that *Richard Ridgely*, the lessor
 of the plaintiff below, could not be concluded by the
 question of law decided in the court of appeals in the
 case of *Daniel Dorsey's Lessee*, use of *Richard Ridgely*,
 against *Rezin Hammond*, because in a legal view he was
 not a party to that suit, and claimed in this action by a

JUNE 1821. title paramount the title of *Daniel Dorsey*; and in the same exception the court further determined, that the construction of grants belonged exclusively to the courts of justice, except in the single instance of a latent ambiguity, where alone is devolved on the juries of the country, the right of exposition aided by evidence *de hors* the grant.

Hammond
vs
Ridgely

In the second exception, the parties were fairly before the court on the true meaning of the certificate and grant of *Dorsey's Search*, (the original,) and the court below decided, that after its first line, the tract was to be located to run with course and distance only, and was not to bind on the *Patuxent* river in any of its lines, except the first.

The third exception is a recapitulation of the first and second as to the court's opinion of the construction of the certificates and grants of *Dorsey's Search*, (the original,) and of *Dryer's Inheritance*, which last tract, in its last line, it was determined by the court, ought to be located with a straight line, and not circuitously with the windings of the river.

These exceptions, connected with the argument in the cause, have presented a question for the decision of this court, of high interest to the parties concerned, and of great moment to the public at large. It is a question which involves in its consideration, the legal effect an adjudication of this high court of judicature is to have on its own future operations, and being in every view momentous, it has engaged the best reflections, and the utmost attention of the judges.

There must reside in every court of supreme authority, and especially in this of appellate jurisdiction of last resort, a capacity of revising and correcting its own decisions. That such a power rests in this court, has been conceded in argument; and yet a construction of the 56th article of the constitution is insisted on, that seems to deny its existence. If, as it has been said, it is the literal meaning of this article of the constitution to make a judgment of the court of appeals final and conclusive in all future cases, in what case is it we are to exercise an authority to review and abrogate its decisions? This construction is so at variance with the very nature of courts of justice of supreme jurisdiction, it is fair to infer that such is not the intention of the constitution; and indeed, it appears to me, the expressions employed are inserted for a

quite different purpose—either to describe and characterise the court established, or to restrain apprehended legislative encroachments on the judicial functions of the state.

Hammond
vs
Ridgely

The generality of the expressions of this article of the constitution excludes the idea of an intention to make a judgment of the court of appeals final and conclusive on the same question of law between the same parties. Had this been the object, more appropriate language would have been used to express it; and that it was not the object is deducible from the consideration that it was wholly unnecessary in every other action, except the action of ejectment, in which the propriety of it may be questionable. In all other actions, but ejectment, former recovery may be pleaded in bar, and this, by the rules of the common law, without the aid of constitutional provisions. Moreover, if this had been understood to be the clear meaning of the 56th article of the constitution, a part of the act of 1790, *chapter 42*, was superfluous legislation. On the return of a record with a *procedendo*, the opinion expressed in the case would have been conclusive without enacting that it should be so.

Having expressed my opinion, that the article referred to in the constitution does not render a judgment of the court of appeals, on the same question of law, conclusive between the same parties, I am equally decided, that the act of 1790, *ch. 42*, does not make such judgment conclusive, except on the subordinate tribunal to which the record is returned on a *procedendo*. It is to be remembered, that this act of the legislature speaks of more appellate jurisdictions than one, of the appellate jurisdiction of the general court, as well as of the court of appeals; and if the opinion of the inferior appellate court is conclusive because it has been before expressed on the same subject matter between the same parties, it must have that effect in the same case between the same parties when it appears in the supreme appellate court; that is, the opinion of the inferior must govern the opinion of the superior appellate jurisdiction. This cannot be the meaning of the act, and thence it is to be inferred, that the opinion expressed in the appellate court was intended to be conclusive only on the court to which the record is returned on the *procedendo*. It is admitted in this last case, such opinion of the superior court has a binding force on the inferior tribunals.

JUNE 1821. and if the injunctions of the law are obeyed by the county court, on a second exception the court of appeals will affirm, not because the opinion is approved, but because a court cannot err that obeys the positive injunctions of the law. This is the amount of the cited decisions between *Tenant and Hambleton*, and *Mundell's lessee and Clarklee*, and it was never intended that those decisions should be understood in any other way.

Hammond
vs
Ridgely

The solemn adjudication of an appellate court of last resort, I am free to admit, ought, on general principles of judicial propriety, to be approached with caution, and perhaps they should never be disturbed, except to settle some great rule of property the public interest requires to be reviewed. On a second trial in ejectment between the same parties, and those claiming under them, on the same subject matter, I should say they ought to be considered conclusive, unless, which is hardly a supposable case, glaring injustice has been done, or some egregious blunder has been committed. But to give the binding decision those conclusive qualities, it ought to be explicitly declared, and perfectly understood, and to become the law of the case it ought definitively to settle the rights of the litigant parties. If an exposition is given to a will or deed, fully defining the rights of the parties, or any other opinion is expressed settling the title to the thing in dispute between them, it should be deemed irrevocable, and never again touched, where the same persons, and those claiming under them, are concerned in the contestation. *Richard Ridgely*, the lessor of the plaintiff, was for every substantial purpose, a party to the ejectment formerly decided in the court of appeals between *Daniel Dorsey* and *Rezin Hammond*, and if that court have disposed definitively of the subject, and fully and explicitly determined the rights of the parties, this court ought to yield to the judgment, whatever our individual opinions may be of its correctness. This is not, however, in my apprehension, the character of that decision; so far from settling the meaning of the certificates and grants of *Dorsey's Search*, the original, and *Dryer's Inheritance*; so far from determining to whom the controverted land was originally granted, by a sound construction given to these documentary papers, the court of appeals have declared the courts of justice, and themselves inclusively, utterly incompetent, in point

of law, to give an exposition to them. That court has only adverted to those papers to say, that the office of locating those tracts, according to the meaning of these papers, to be come at through the medium of extrinsic testimony, belongs alone to another tribunal—to a jury of the country—and not to the court of justice. Agreeably to these ideas of the court of appeals, a jury has been allowed to act on the case, and the inconclusive nature of their verdict, being a verdict in ejectment, need not be dwelt upon. By thus acting, the court of appeals as effectually dismissed the case, in my idea, from their consideration, as if they had referred the decision of it to a distinct unconnected court or jurisdiction, whose adjudication certainly could not be said to express the opinion of the court of appeals. It is then my deliberate opinion, that the judgment of the court of appeals in the case of *Daniel Dorsey's Lessee* use of *Richard Ridgely*, against *Rezin Hammond*, ought not to have been considered conclusive by the court below, and by refusing so to consider it, that court has not erred.

JUNE 1821.
 Hammond
 vs
 Ridgely

It remains for me to say a few words on the construction of the certificates of *Dorsey's Search*, (the original,) and *Dryer's Inheritance*. And here I entirely coincide in the opinion pronounced by the learned judge in the court below. With him I think, that *Dorsey's Search*, (the original,) is to be located by course and distance in all its lines from the first to the second tree, except in its first line, which it is admitted on all hands is to bind on *Patuxent River*. Among the objections urged to this construction, the principal one appears to be, that the word "running" cannot be carried on from the first to the second and other courses, to render the sense perfect, without taking with it the words "binding on the river," and that there is a grammatical impropriety in disconnecting the one from the other. The solidity of this objection is not perceived by me, and a case may be readily stated, where the latter expressions, "binding on the river," might not only be dropped, but where to connect them with the word "running," in the subsequent courses, would be to oppose the acknowledged meaning of the sentence. Let us suppose that the expressions in the certificate had been thus; running and binding on the river *the two first* of the following courses, viz. N 4° E 87 perches,

JUNE 1821, then North 62° E 50 perches, then N 21° E 170 perches; and so on through all the courses of the certificate; to connect the latter words, "binding on the river," with the former word "running," and apply them to the third course, it would read "then running and binding on the river N 21° E 170 perches," in direct violation of the expressed meaning of the surveyor, who has declared that the two first only of the courses of the certificate should run and bind on the river. This point of construction is susceptible of much further elucidation, but I have only touched it to express my opinion on it, which I believe is supported by all the members of the court who have heard the argument. The question arising on the construction of the certificate of *Dryer's Inheritance* is too plain for discussion. It is most obvious, that the last, or home course, must be run with a straight line, and cannot be run with the meanders of the river; there not being a single expression any where to be found to sanction such a location.

Hammond
vs
Ridgely

I concur with the county court in their decisions on each of the exceptions, and in my opinion their judgment ought to be affirmed.

MARTIN, J. I think the judgment of the court below, in the first bill of exceptions, is erroneous, and ought to be reversed; but I confess I feel great diffidence in my opinion, when in opposition to that of the learned gentlemen with whom I am associated.

In the trial of this cause several bills of exceptions were taken by the defendant to the opinions given by the court, but as the three last have been abandoned by the appellant, it is necessary for this court to consider the two first exceptions only.

It appears from the record in this case, that the tract of land called *Dorsey's Search*, was granted to *John Dorsey* in the year 1694, and was afterwards vested in *Richard Ridgely*, who conveyed it by a deed of mortgage to *Daniel Dorsey*. That an action of ejectment was brought in the name of *Daniel Dorsey*, the mortgagee, in the general court, to recover the possession of part of this tract from *Rezin Hammond*, the then proprietor of *Dryer's Inheritance*. That this action was instituted by *Richard Ridgely*, for his use and by his direction. That he alone conducted the suit, employed counsel to sustain it, paid all the expenses, and remained in possession of the land.

That a verdict was rendered against *Rezin Hammond*, who appealed to the court of appeals, where the judgment of the general court was reversed. That *Richard Ridgely*, having paid the money due on the mortgage, obtained a deed of release from *Daniel Dorsey*, and instituted this suit against the present defendant, who claims under *Rezin Hammond*, for the same land claimed in the first ejectment. I have given this short statement of the case to show the relative situation of the parties in both ejectments. That *Richard Ridgely* was the substantial plaintiff in both cases; that they were commenced by his direction, and prosecuted solely for his use and benefit; and therefore, for all the purposes of the question now before us, were the same parties, or those claiming under them.

JUNE 1821.

Hammond
vs
Ridgely

Whether a judgment of the court of appeals is conclusive upon the question decided by them, between the same parties in interest, or those claiming under them, is presented to us in the first bill of exceptions; and in forming my opinion upon it, I have rested, in a great measure, upon the constitution of *Maryland*. Policy, public convenience, and the security of purchasers, are worthy the consideration of the court. They are powerful auxiliaries in this case, but I think the constitutional provision is peremptory, and conclusive upon it.

In the organization of the judicial system of this state, courts have been established with original jurisdiction, and in the course of judicial proceedings, either party may call in the aid of the court to decide upon questions of law. The judges thus called on are authorised to *expound* the law, but their decision is not conclusive upon it. It may be carried to a higher tribunal for adjudication. The court of appeals has jurisdiction of it, but when decided by that court, it is no longer subject to be revised. In the emphatic language of the constitution, it is final and conclusive; the question decided is put to rest; no court shall have a power to revise it; all courts shall be bound by it. The constitution declares, there shall be a court of appeals, whose judgment shall be final and conclusive in all cases of appeal from the general court, court of chancery, and court of admiralty. *It is declaratory of the power and effect of a judgment in the court of appeals:* And is not *conclusiveness* of decision consistent with the character and dignity of a tribunal of the last resort? The object to be attained

JUNE 1821. is certainly a point at which controversy shall cease; but this desideratum is defeated if it is still open to revision. It is a solecism of terms to say, a decision is final and conclusive, when it is subject to change and alteration.

Hammond
vs
Ridgely

It appears to me, no language can be more comprehensive than that of the constitution, and it must be conceded, no violence is done to it by my construction. No words of restriction; no words of limitation or explanation, are added to it; and I would ask, if the convention meant that the judgment of the court of appeals should *not* be subject to revision, what words would they have used more clearly to evidence that intention? Can human ingenuity suggest any terms by which it would be more fully expressed than that the judgment shall be final and conclusive? If it was intended merely to prevent the creation of other tribunals of justice, why was it not so expressly declared? Why use terms of universal import, if they were to be taken in a limited sense, unless indeed it was the object of its framers to give to that august instrument, all the uncertainty which, it seems from the argument, ought to belong to a decision of the highest tribunal in the state. Since then the language of the constitution is of general, and indeed *universal* import, I think we ought not to give it a limited construction, by which the law will be rendered fluctuating and uncertain, and a door will be opened to unceasing controversy.

This is my view of the constitution, and if it is not correct, what would be the consequence of it? If a judgment be reversed by the court of appeals, and a *procedendo* awarded, it is admitted, by the act of 1790, the decision would be conclusive, on the question decided, in a second trial, and the court would be bound to conform to it. Yet although they would be bound to conform to it in the second trial, if a new ejectment was instituted, and the *same* question was brought before the *same* court, between the *same* parties, at the next term, the decision would lose all its binding effects, and the court would be at liberty to set it at defiance. To day it would be binding and conclusive upon the inferior court; to-morrow it would cease to be law, and be disregarded by them. Litigation would be in a circle with no point of certainty on which it could rest.

It next becomes proper to inquire, what were the ques- JUNE 1821.
 tions on which the general court and court of appeals dif-
 fered, and whether those questions affected the merits of
 the case depending?

Hammond
 vs
 Ridgely

It was determined in the general court, there was no ambiguity or doubt in the grant of *Dryer's Inheritance*; that the court, and not the jury, were to give the construction of it; that the grant was to be construed by itself, and testimony extrinsic of the grant was not legal evidence to aid in its construction; and upon the same principles, the court, and not the jury, gave the construction to *Dorsey's Search*. The court of appeals negative and reverse all those opinions of the general court. They say, there is doubt and uncertainty on the face of those grants; that the court had no authority to construe them; that they ought to have been submitted to the jury, who were the legitimate tribunal, with the aid of extrinsic evidence, to give their true construction; and for those errors they reverse the judgment of the general court. This is the construction I give to the opinion delivered by the court of appeals. It is true, the language used by them is not very clear and explicit; but if they did not differ with the general court, and differ in *essential points*, why did they reverse their judgment? And why did the decision of the court of appeals govern the court below upon the *procedendo*, and produce an effect in direct opposition to that of the opinion of the general court in the first trial? For we find in the first trial, the court gave the construction to the grants, and the verdict was for the plaintiff. On the *procedendo* the construction of the grants was submitted to the jury, and the verdict was for the defendant.

It has been contended, that no construction has been given by the court of appeals to those grants, and therefore the decision has only established a general principle, and not the law of the grants. I admit the court of appeals have not given a full construction to them; they have not said whether their expressions were binding. But can it be a correct position, that because the court of appeals have not decided *every* question that could arise in a cause, that therefore its decision should not be conclusive upon those they did decide?

Altho' they have not given a full construction to those grants, they have given a *character* to them, and they de-

JUNE 1820. Chandler
vs
The State declared that the jury, and not the court, was the proper tribunal to construe them. The general court held the decision to be conclusive, and conformed to it. In the trial of this ejectment, the same questions were presented to the county court, and in my opinion, the decision of the court of appeals was as conclusive upon them as upon the general court.

Upon the second bill of exceptions, I concur in the opinion expressed therein by the court below. The binding expressions in *Dorsey's Search* ought to be confined to the first line, and cannot be extended further.

DORSEY, J. delivered his opinion, which we regret we have not been able to procure, in which he concurred with Judge *Martin*.

Winder suggested to the court, that as they were equally divided in opinion, no judgment could be rendered; but

THE COURT directed the judgment to be entered *affirmed*. See *Dighton vs Grenville*, *Cole's cases*. in *Parl.* 66, where the judgment was affirmed, there being three judges for reversing, and three for affirming, so that a majority being required to reverse the judgment, it was of course to stand.

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1820.

CHANDLER vs. THE STATE, (a.)

A special demurrer to a count in a declaration, of general *indebitatus assumpsit* for a certain sum, without setting out the cause or consideration upon which the debt accrued, ruled good.

The printer of the state, holding his office under an annual salary, is not entitled to additional compensation for any duties by him performed as such.

APPEAL from *Baltimore* county court. This was an action of *assumpsit*, instituted by the appellant, (the plaintiff in the court below,) against the state. The declaration contained *three* counts—The *first* for sundry matters properly chargeable in account; the *second* for work and labour, &c. and the *third* a general *indebitatus assumpsit* for a certain sum of money, without setting out the cause or consideration upon which the debt accrued. To the *first* and *second* counts the general issue was pleaded; and to the *third* count there was a *special demurrer*, and the causes of demurrer were—1. That the plaintiff, in that

(a) This case, not being prepared by the reporters, was omitted in its proper place.

count, does not set forth any cause or consideration upon which the pretended debt accrued; and 2. That he doth not set forth how, or for what cause, or in what manner, the state became indebted to him. *Joinder* in demurrer. The county court ruled the demurrer good.

At the trial of the issue in fact, the case appeared to be as follows: On the 6th of November 1811, by a resolution of the general assembly it was resolved, that the plaintiff "print the laws and votes and proceedings, and perform such other services as have been usually performed by the printer employed by the state, or may be required by the legislature, or either branch thereof, or by the governor and council." The plaintiff continued printer for three successive years, and performed all the services stated in his account filed, wherein he charged the state with work and labour, and materials found, in printing the laws and votes and proceedings of the sessions of 1811, 1812 and 1813, including the votes and proceedings for the justices of the peace, amounting in the whole to

\$5564 75

He credited the state with three years salary of \$1200 per annum, and \$243 allowed to him by the executive, under the resolution of 1811, No. 64,

3843 00

\$1721 75

On the 19th of November 1811, a resolution passed requiring the printer to print the laws and votes and proceedings in a form different from the former mode of printing them. On the 24th of December 1811, the plaintiff petitioned for extra compensation on account of the additional expense and trouble by reason of such alteration; which petition was referred to a committee, who reported a resolution authorising the governor and council to make him compensation for such additional services; but the resolution was referred to the next general assembly. The act for paying the civil list was passed on the 27th of December 1811, in which the printer was allowed a salary of \$1200, which he regularly received. At November session 1812, a resolution passed authorising the governor and council to adjust the plaintiff's claim, "and allow him such sum as they may in justice believe him entitled to for any services he may have performed, or expenses incurred, beyond the ordinary services which had been performed, and

JUNE 1820.

Chandler
vs
The State.

JUNE 1820. expenses incurred by his predecessor." The governor and council, under that resolution, allowed to the plaintiff \$243 for the extra services and expenses imposed on him by the resolution of 1811, No. 64. The plaintiff claimed from time to time a further compensation on the same account, for printing the laws and votes and proceedings for the years 1812, 1813, 1814 and 1815. The house of delegates in 1816 proposed by a resolution to allow him \$700; in 1817 they proposed to allow him an additional sum to make his salary for each of the years 1813, 1814 and 1815, equal to \$1400 per annum; and in the same year they proposed to authorise the governor and council to settle and liquidate his claim. Neither of which resolutions was concurred in by the senate. The acts for the payment of the civil list for the years 1816, *ch.* 230, and 1817, *ch.* 212, allowed to the printer an annual salary of \$1400. It appeared to have been the usage to pay to the printer of the state a separate compensation for printing the laws and votes and proceedings of all extra sessions, over and above the salary allowed by the acts to pay the civil list; and for all printing specially directed by both branches, or either branch of the legislature, or by the governor and council, separate allowances, as for work and labour done, have always been made to the printer of the state, over and above the annual salaries fixed by the acts for paying the civil list. The *third* section of the act of 1790, *ch.* 51, directing the printing and distributing the laws and votes and proceedings, did not direct that a copy of the votes and proceedings should be printed and sent to the justices of the peace. The governor and council, on the application of the plaintiff relative to the number of copies of the votes and proceedings required to be printed of November session 1811, gave it as their opinion that the act of 1790, *ch.* 51, *s.* 3, did not make it the duty of the printer to print the votes and proceedings for the justices of the peace, but that the general usage had been to print them; and they advised him to furnish the copies, &c. By an order of the house of delegates adopted in 1794, it was ordered, "that the printer of the state transmit, at the end of each session, to each person entitled to a copy of the laws, a copy of the votes and proceedings of the legislature." On the application of the plaintiff to the general assembly at June session 1812, stating that he had not been apprised of the

Chandler
vs
The State

order of 1794, or he would have complied with it, a resolution was then passed, declaring it to be "the duty of the printer of the state to print a sufficient number of copies of the votes and proceedings at the last session for each justice of the peace." Under this resolution the plaintiff did print 690 copies of a second edition of the said votes and proceedings, which he charged to the state in his account exhibited. Evidence was offered, that the former printer to the state claimed compensation for printing *Kilty's* edition of the laws, which claim, by a resolution, was referred to the governor and council, who made an allowance therefor, and which was paid to the printer; after which he brought an action against the state, and recovered a further sum, which was paid to him under a resolution in 1810. On these facts the counsel of the state prayed the court to direct the jury, that the plaintiff, from the time of his appointment to the office of printer to the state in November 1811, until a period subsequent to the 1st of April 1814, held his office under an annual salary of \$1200, which by his account he acknowledged to have received, and that he is entitled in law to no additional allowance; and further, that the rendering of the services specified in the plaintiff's said account as printer to the state, does not furnish any consideration upon which an assumpsit can be implied from the state, and consequently he is not entitled to recover in this action. Which direction the court, [*Dorsey, Ch. J. and Hanson, A. J.*] did give to the jury. The plaintiff excepted; and the verdict and judgment being against him, he prosecuted this appeal.

The cause was argued before BUCHANAN, EARLE and JOHNSON, J.

Pinkney and *R. Johnson*, for the appellant, contended,
 1. That this action could be sustained against the state under the act of 1786, *ch. 53*. 2. That there was a sufficient consideration to support an *indebitatus assumpsit*. On the *first point* they referred to the acts of assembly of 1786, *ch. 53, ch. 49*; 1816, *ch. 98*; May 1781, *ch. 17*; 1786, *ch. 18*. Also *Nicholson vs. The State*, 3 *Harr. & M'Hen.* 109. *The State vs. Chase*, in this court, at December 1810, and *Green vs. The State* in *A. A. county*

Chandler
 vs
 The State

JUNE 1820. court in 1810. On the *second point* they referred to the several acts of assembly, resolutions, and votes and proceedings, herein before mentioned.

Chandler
vs
The State

Winder and *Boyle* (employed by the executive—*Williams*, the assistant attorney general, having been the appellant's counsel,) for the state, contended, 1. That the action could not be maintained against the state. 2. That the plaintiff was a salaried officer; and 3. That there could not be an implied, where there was no express *assumpsit*. They relied on 1 *Com. Dig.* tit. *Actions*, (C. 1.) 6 *Com. Dig.* tit. *Prerogative*, (D. 78.) 3 *Blk. Com.* 255, 256. *Riley*, 251; and the several acts of assembly, resolutions, and cases referred to by the appellant's counsel.

BUCHANAN, J. delivered the opinion of the court. This case comes before us on an appeal from the judgment of the county court of *Baltimore*, in a suit instituted by the appellant against the State of *Maryland*, under the act of 1786, *ch.* 53.

The two counts relied upon in the declaration are, the *first* on a general *indebitatus assumpsit* for sundry matters properly chargeable in account; and the *second* for work and labour done, and materials found. And on an attentive examination of the evidence produced at the trial, and set out in the bill of exceptions, we are constrained to say, that whatever demand the appellant may have on the liberality of the legislature, the law will not sustain the claim he has set up.

The printer to the state, is an officer appointed by the legislature, whose duty it is, to print the laws and resolutions, and the votes and proceedings of each session, on a salary annually fixed and ascertained by that body, and provided for by an act for the payment of the civil list, according to invariable usage, since the year 1784; and it appears to have been the constant practice, to print a sufficient number of the votes and proceedings, for the use of the justices of the peace, throughout the state, without any other compensation than his annual salary provided for, and paid as before stated.

At the November session 1811, the appellant was appointed printer to the state by the legislature, who at the same session passed a resolution, directing the laws and resolutions, and the votes and proceedings, to be printed

in a manner and style different from that in which they had usually been printed. On which he preferred a petition to the legislature, complaining of the alteration directed in the manner of printing the laws, &c. and proposing, instead of a gross sum as a compensation in the form of a salary, the adoption of a different mode of payment.

This application was rejected; and by the act for the payment of the civil list, which was subsequently passed, but at the same session, his salary was fixed at \$1200. At the extra session of June 1812, he presented a memorial to the legislature, requesting an expression of their wishes and opinion on the question, whether it was his duty to print the votes and proceedings of the preceding November session of 1811, for the justices of the peace, with a suggestion of the expectation, that they would make him a compensation for it; at the same time acknowledging the pre-existing practice by the printers to the state, to print the votes and proceedings of each session for the justices of the peace; and admitting, that if he had been aware of the order of the house of delegates in 1794, directing a copy of the votes and proceedings to be furnished by the printer, to each person entitled to the laws, he would have conformed to that practice; but resting his excuse for not doing so on the act of 1790, *ch.* 51, which does not expressly direct it to be done.

In consequence of which, the legislature passed a resolution, (not *making* it his duty,) but *declaring it to be his duty*, to print the votes and proceedings of the November session 1811, for the justices of the peace, but allowing him no compensation for it, and expressing no wish upon the subject. After the passage of which resolution he printed 690 copies of the votes and proceedings of that session, for the use of the justices of the peace; and at the November session 1812, he preferred a petition to the legislature, asking an additional compensation for the increased expense he had been at in printing the laws, &c. in conformity with the resolution passed at the preceding November session, directing a different manner of printing them, which subject was referred to the governor and council, who allowed and caused him to be paid \$243, as an extra compensation.

For the years 1812, 1813 and 1814, he continued printer to the state, at an annual salary of \$1200, which was

Chandler
vs
The State

JUNE 1820.

Chandler
vs
The State

provided for; as usual, in the annual law for the payment of the civil list, and, as it appears, was all regularly paid.

During which years he printed the laws and resolutions, and the votes and proceedings, agreeable to the requisitions of the resolution of the November session 1811, and printed and distributed the votes and proceedings for the use of the justices of the peace; and this suit was brought to recover the value of his work and labour done, and materials found, in printing the votes and proceedings for the justices of the peace, and in the altered manner of printing the laws, &c.

It appears to have been the settled usage, to pay for the printing of the laws and resolutions, and the votes and proceedings, in the form of a salary to the printer, and in no other way. And as it had been the uniform practice for the printers to the state to print a sufficient number of the votes and proceedings of the legislature for the use of the justices of the peace, with no other compensation for that description of service than the annual salary provided for towards the close of each session, by an act for the payment of the civil list, the legislature must be understood as having made, and the appellant as having accepted, the appointment of printer to the state, with a view to that practice, which thus entered into, became a constituent part of the contract.

The act of 1790, *ch. 51, s. 3*, prescribing the duties of the printer to the state, directs that, immediately on the receipt of the votes and proceedings, and the laws and resolutions of the legislature, he shall proceed to print and stitch them, and print, stitch and pack up, under the direction of the governor and council, one copy of the laws and resolutions, and one copy of the votes and proceedings of each branch of the legislature, for the governor and council, and for each member of the general assembly; one copy of the laws and resolutions, well bound in blue boards, and four copies of the votes and proceedings, for the clerk of each respective county, &c. one copy of the laws and resolutions for each of the judges and justices of the peace within this state, and for the attorney general; one copy of the laws and resolutions for the register in chancery, and for the register of wills in each respective county, and for the clerk of the general court, on the western and eastern shore respectively, and for the respective trea-

JUNE 1820,

Chandler
vs
The State

surers, &c. and seal and direct them accordingly, and deposit them in the council chamber, &c. under certain penalties. It is true that *this law* does not make it the duty of the printer to the state to print, &c. the votes and proceedings for the use of the justices of the peace, and it would not have been incumbent on the appellant to do so, if the resolution of the November session 1811, appointing him the printer to the state, had merely conferred upon him the appointment, without saying any thing more.

But that resolution is in these words, "Resolved, that *Jehu Chandler* print the laws, and votes and proceedings of the general assembly, and *perform such other services as have been usually performed by the printer employed by the state*, or may be required by the legislature, or either branch thereof, or by the governor and council."

The words "and perform such other services as have been usually performed by the printer employed by the state," cannot, we think, be understood as having relation to any services required by the act of 1790, *ch. 51, s. 3*, such as "stitching, packing up," &c. because, if he had simply been appointed printer to the state, without anything more being added, it would have been his duty to do whatever is directed to be done by that law, and those words having no other object, would have been altogether nugatory.—Nor can they be considered as having reference to mere job-work, not embracing the laws and resolutions, and votes and proceedings, such as printing for the house of delegates, or the senate, or governor and council, which is all provided for by the latter clause of the resolution, "or may be required by the legislature, or either branch thereof, or by the governor and council."

They were, however, introduced for some purpose, and must be construed to relate to services resting entirely in *usage*, as distinguished from such as were expressly enjoined by law, and not necessary to be provided for—otherwise they would have been omitted as useless, or a different phraseology been employed, such as "*are by law required to be performed*," in the place of "*have been usually performed*."

They were intended to embrace any, and every thing, so resting in usage. Was there any such service?

The settled practice, to print a sufficient number of the votes and proceedings for the use of the justices of the

JUNE 1820.

Chandler
vs
The State

peace throughout the state, with no other compensation than the annual salary ascertained by law, (whether in consequence or not of the order of the house of delegates alone in 1794, which directs it to be done, is not material,) was a service of that description, a service that had been usually performed by the printer employed by the state, in his character of a salary officer, and within the terms of the resolution; which terms the appellant virtually accepted, by entering upon the duties of the office. There was, therefore, no *assumpsit* by the state, either express or implied, to pay him for such service, in any other way than in the form of an annual salary, which he has received. On the contrary, the resolution passed at the June session in 1812, declaring it to be his duty to print the votes and proceedings of the preceding November session, for the justices of the peace, negatives the idea, and his proceeding to print them after such an expression of opinion, was a recognition of it, as a service falling within his duty as a salary officer.

As to the alteration made by the resolution of the November session of 1811, in the manner of printing the laws, &c. it cannot be denied, that the legislature have a right to prescribe the manner of printing their laws, &c. And let it be remembered, that the appellant proposed to the legislature, before he had printed any of them, to abolish the mode of payment by a fixed salary, and to compensate him for the work and labour, &c. in another way, which they declined doing, but adhered to the established usage, and the manner of printing before directed, and fixed his salary at \$1200; with a knowledge of which he did not decline the office, but went on and did the work as directed, and thus tacitly not only acknowledged the duty, but accepted the resolution, prescribing the manner in which the work should be done, as a part of his contract, and agreed to receive the salary, so ascertained, as his pay. Considering him, therefore, as a salary officer of the state, and the services for which he seeks remuneration beyond the amount of his salary, as rendered in that capacity, he is not entitled to recover in an action at law, for either class of those services, as for work and labour done, &c. but must be content with his salary, which excludes all idea of an implied *assumpsit* to pay the value of his work, whatever that might be. A contract for a fixed salary,

JUNE 1820.

Chandler
vs
The State

and an implied *assumpsit*, cannot stand together; otherwise any clerk engaged at a fixed salary, would be entitled to recover in an action of *assumpsit* for any increased labour he might be put to, in consequence of an extension of his employer's business, which cannot be. And this, in fact, is but a suit by a salary officer, for the inadequacy of his salary, to the duties discharged as such. With respect to the claim for printing the votes and proceedings for the use of the justices of the peace, the concluding counsel for the appellant, did indeed seem, in argument, to limit his pretensions to a compensation only for printing the 690 copies of the votes and proceedings of the November session 1811, virtually yielding all other, and founding that claim solely on the application of his client to the legislature, for their opinion on the question, whether it was his duty to print them, and the consequent resolution adopted by that body, declaring it to be his duty. But it is not perceived that the expression by the legislature, of the opinion that it was his duty to perform that service as a salary officer, amounted to an implied *assumpsit* to make him a compensation for it over and above his salary. And surely, the circumstance that the legislature, at the November session of 1812, gratuitously referred to the governor and council the question, whether he should be allowed any additional compensation for the alleged increased expense he had been at in printing the laws, &c. of the November session 1811, in the manner and style directed by the resolution of that session, furnishes no evidence of an implied agreement to pay him an extra compensation beyond his salary for the ensuing year, and more particularly as his salary was continued to be fixed at \$1200 for each succeeding year, in which he acquiesced, and continued to discharge the duties required of him, and thus recognised the principle, that he was to be paid by way of salary alone—And the additional allowance made him by the governor and council, under the reference, for printing the laws, &c. of the November session 1811, has been paid.

In this view of the subject, it is not necessary to look into the question raised in argument, whether the claim of the appellant is of that description, for the recovery of which the act of 1786, *ch. 53*, provides the right to sue the state.

JUNE 1820.

Chandler
vs
The State

JOHNSON, J. This was an action brought against the state, to recover a compensation for work and labour, and for the materials furnished by the plaintiff in printing, (amongst other things,) 690 copies of the votes and proceedings of the legislature for the year 1811.

It appears to me, that the state, in all cases where it employs an individual, and obtains his services, is bound to make a compensation for such services; and unless they are performed for a stipulated compensation, or comprehended in the duties to be performed for a fixed salary, the amount of the compensation no more rests with the state, than it would rest with an individual employer. The services being performed, the law, as well against the state, as the individual employer, raises an obligation, and creates an implied *assumpsit*, to make such compensation as the services and articles found are worth, to be ascertained, (the state having by law permitted the suit to be brought,) through the instrumentality of a court and jury.

The 690 copies of the votes and proceedings having been printed for delivery, and accepted by the state, through the proper channel, the printer, if he has not been compensated therefor, ought to sustain his claim.

To form an opinion on this subject, it is necessary to examine into the contract made between the state and the plaintiff. And as he has received an annual salary from the state, to ascertain whether that salary can be made a compensation for the work in question.

On the 6th of November 1811, the plaintiff, by a resolution of the legislature, was called on "to print the laws and votes and proceedings of the general assembly, and *perform such other services as have been usually performed by the printer employed by the state*, or that may be required by the legislature, or either branch thereof, or by the governor and council." Under this resolution the plaintiff commenced, and went on to print; by doing so, he acceded to the terms of the resolution, and the contract became thereby mutually binding; he was bound to perform the work, and the state to compensate him for the same.

Long before and at the time of the passage of the resolution, the uniform practice of the state had been to pay the printer for "printing the laws and votes and proceedings," by an annual salary, ascertained near the conclu-

sion of the session, by the passage of a law for the pay-ment of the civil list, in which the printer is included.

It will be perceived that the resolution which contains the terms of the contract between the state and the plaintiff, prescribes not the *extent* of the work to be done by the printer; it directs him to print the "laws and votes and proceedings," and perform such other services as have been usually performed by the printer to the state.

As then the contract itself is silent as to the extent of the services, we must resort to other sources to ascertain its meaning, and find out what services he was to perform, connected with the laws and votes and proceedings, and the number his contract called on him to publish, for the contemplated salary.

By the act of 1790, *ch. 51*, which law was in full operation, and the only law existing when the plaintiff contracted to work for the state, the whole extent of the duties he is called on to perform, as connected with the laws and votes and proceedings, are pointed out with precision, and these are the duties for which the printer is compensated by the annual salary given him in the law for the payment of the civil list. The act of 1790, *ch. 51*, explicitly declares the *names* or *characters* of those officers of the government who are to receive the laws, together with the votes and proceedings, and who are to receive the laws and resolutions. It directs, that the printer "*shall print and stitch, and pack up, under the direction of the governor and council, as many copies thereof as shall be sufficient for the following persons and purposes; that is to say, one copy of the laws, resolutions, and one copy of the votes and proceedings of each branch of the legislature, for the governor and council, and for each member of the general assembly;*" and after designating those who are to have copies of the votes and proceedings, it directs who are to have copies of the *laws and resolutions*, and amongst the persons thus mentioned are the *justices of the peace*.

It would seem impossible to entertain a doubt, but that the printer of the state, under this law, which was the only law existing when he contracted, was not bound to furnish a copy of the votes and proceedings for *each justice of the peace*.

Chandler
vs
The State

JUNE 1820.

Chandler
vs
The State

We have seen, by the resolution under which the appointment was made, that he was to "perform such other services as have been usually performed by the printer employed by the state." The effect and operation of these words are, that the printing shall be done under the regulations contained in the act of 1790, ch. 51; and the printing, when done, "*stitched and packed,*" &c. as there directed. This appears most evident to me; for the latter part of the resolution makes it his duty, to do what in addition "the legislature, or either branch thereof, or the governor and council may require," thereby leaving the words of the resolution confined to the stitching and packing the work as directed by the act of 1790, ch. 51.

Having thus ascertained the extent of the duties to be performed by the printer, and what the annual salary comprehends, it remains to be considered whether he has done any other work for which he has received no compensation.

The plaintiff having printed and packed the number of the laws and votes and proceedings *directed by the act of 1790*, called on the executive for their construction of that act, to know from them, whether he was *bound* to furnish the justices of the peace with the votes and proceedings. They agree that the act did not demand them, but *advise him* that it was best to furnish the copies, without directing that he should do so.

In June 1812 an extra session of the legislature was held, and the printer, by his memorial, requests of them to be directed, if to furnish the copies of such was their desire, expressing his belief that the legislature would not demand his labour without making compensation. The legislature of that session do not *direct* him to print the votes and proceedings for each justice of the peace; they do not promise compensation, but say *it was his duty to print them*.

The legislative will being thus expressed, the plaintiff did print the 690 copies of the votes and proceedings for the justices of the peace, for the printing of which no compensation has been made, and to obtain satisfaction for them the present suit was brought.

By the act of 1790, if the printer fails to perform the duties thereby imposed on him, he incurs considerable penalties, and forfeits his salary.

The plaintiff thought he was not bound to print, the executive advise him, and the legislature declare it his duty to print them.

JUNE 1821.

The State
vs
Chase

If this was a contract between two individuals, I should conceive little doubt could be entertained. Suppose one individual to engage another to do certain work for him, and in the performance of the work the parties differ, (as is often the case,) as to the extent of the contract—the employer demanding more work to be done than the workman thought himself bound to do. The workman says he will go on, if he is to be paid; he is told to go on, because it is his duty under the first contract. He does go on, and completes more work than the first contract covered. Could the defence for one moment be sustained, that the workman should have no compensation for the extra work, because the employer did not promise to pay or direct him to proceed, but only declared he was bound to proceed? If the contract did not embrace the work, the law would raise an implied *assumpsit*, and compel payment. The case before the court is not distinguishable from the one supposed.

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1821.

THE STATE vs. CHASE.

ERROR to *Anne Arundel* county court. This was an action of *assumpsit* brought against the state. The declaration contained two counts, one for work and labour, &c. and the other on a *quantum meruit* for work and labour. The general issue was pleaded.

1. At the trial the plaintiff, (now defendant in error,) gave in evidence, that he was, on the 27th of January 1806, appointed and commissioned chief judge of the third judicial district of this state, and that he accepted the said appointment and took upon himself the performance of the duties thereof, after having subscribed a declaration of his belief in the christian religion, and taken the several oaths required by the constitution and laws of this state to be taken by him as chief judge as aforesaid. That he hath continued to hold the said office, under his said commission, and still doth hold the same, using, exercising and performing, all the powers and duties thereof. That at vari-

A judge is not entitled to compensation for the performance of extra judicial services imposed upon him after the date of his commission.

Services performed by the chief judge of the third judicial district, as chancellor, under the acts of 1805, *ch. 65*, s. 19, 1806, *ch. 55*, s. 2, and 1811, *ch. 189*, are judicial services.

An action would lie against the state, under the act of 1786, *ch. 53*, for all description of claims against the state.

JUNE 1821.

The State
vs
Chase

ous times, and in various cases, since his appointment and acceptance of the office of chief judge as aforesaid, he hath been called upon, agreeably to the provisions of the act of assembly hereinafter mentioned, as chief judge of the third judicial district aforesaid, and during the recess of the county courts of the said judicial district, to perform and render the several duties required to be performed and rendered by him as chief judge as aforesaid, under and in virtue of the provisions contained in the acts of assembly of 1806, *ch. 55*, and 1811, *ch. 189*, and that he did well and faithfully perform, and render all the said duties, whenever and as often as he was called upon and required so to do. And to prove services to have been rendered by him, under and in virtue of the act of 1806, *ch. 55*, he offered in evidence the bills, papers, and whole proceedings in the court of chancery, in a number of cases; and the certificate of the chancellor in those cases, stating that he could not conscientiously act thereon; and also read in evidence the several orders and decrees passed by him in the said suits under and in virtue of the said act of assembly, the complainants therein having made their election as stated in the said act of assembly. He also offered in evidence sundry cases depending in the court of chancery, wherein the chancellor requested him to give his opinion upon questions of law arising thereon; and that accordingly, and in virtue of the act of assembly of 1811, *ch. 189*, he did give an opinion on the said questions, which opinions were read in evidence to the jury; and he proved all the services set forth above to have been rendered by him subsequently to his appointment as chief judge as aforesaid, and to the passage of the laws under which he grounds his claim to be compensated for them. He also offered in evidence the proceedings of the house of delegates upon a memorial preferred by him to the general assembly in the year 1807, allowing, by a resolution passed that house, the sum of \$200 to the chief judge of the third judicial district, as a compensation for his services performed under the act of 1806, *ch. 55*.

The state then, by its counsel, offered in evidence, that the plaintiff held the office of chief judge of the third judicial district, from the 27th of January 1806, until a period subsequent to the institution of this suit, under an annual salary of \$2200. That from the time of his appoint-

ment to the office of chief judge, until after the bringing of the present action, he regularly received, as it became due, the salary of \$2200, so allowed him by law. The state also offered in evidence the proceedings of the senate in the year 1807, negating the resolution which passed the house of delegates as herein before referred to; and the proceedings of the house of delegates at December session 1818, negating the resolution proposing to allow the chief judge, as a compensation for his services performed under the act of 1806, ch. 55, one year's additional salary. The plaintiff then prayed the court to instruct the jury, that upon the above statement of facts, if the jury find the same to be true, he is entitled to recover. Which instruction the court, [*Ridgely and Kilgour, A. J.*] gave to the jury, being of opinion, that an implied *assumpsit* was created on the part of the state, that the plaintiff should be paid and satisfied for the services above stated to have been performed, if proved to the satisfaction of the jury; and that it was the province of the jury to determine the amount of such compensation. The state, by its attorney, excepted.

JUNE 1821.
The State
vs
Chase

2. The state, by its counsel, then prayed the opinion of the court, and their direction to the jury, that the plaintiff having held the office of chief judge of the third judicial district from the time of his appointment on the 27th of January 1806, until after the institution of this suit, under an annual salary of \$2200, which he admits to have been regularly paid to him, is not entitled in law to any additional compensation from the state; and that the services, of which evidence has been offered, constitute no consideration from which an *assumpsit* on the part of the state can be implied; and that therefore he is not entitled to recover in this action. Which opinion and direction the court refused to give. The state, by its counsel, excepted.

3. The state, by its counsel, also prayed the opinion of the court, and their direction to the jury, that as the act of 1805, ch. 65, which passed prior to the plaintiff's appointment as chief judge of the third judicial district, and under which he holds his commission, required him to hear and determine all cases in which the chancellor might be interested; and the case of *Kilty and Simmons* against *Lane* and others, and *Kilty* against the heirs of *Brown*,

JUNE 1821.

The State
vs
Chase

were cases of that description, the plaintiff was bound to hear and determine them without being entitled to any allowance therefor in addition to his annual salary as chief judge of the third judicial district; and that the services rendered in hearing and determining those cases, constitute no consideration from which an *assumpsit* on the part of the state can be implied, and that consequently the plaintiff is not entitled to recover any compensation therefor, although the chancellor had certified to the said chief judge that he could not conscientiously act thereon. Which opinion and direction the court refused to give. The state, by its counsel, excepted. Verdict for the plaintiff for \$3000 current money damages. Upon which a judgment was rendered for the plaintiff; and on which judgment the state brought a writ of error, returnable to this court.

The cause was argued before BUCHANAN, EARLE, JOHNSON, MARTIN, and DORSEY, J.

Williams, (Assistant Attorney-General,) *Pinkney*, and *Ridout*, (District Attorney,) for the state, contended—1. That no action could be maintained against the state, in cases of this description, under the act of 1786, *ch. 53*, which act, they contended, authorised suits against the state only where claims against the state could not be settled and adjusted with the auditor general, by reason of a disagreement between the claimant and the auditor, as to the sum to be allowed. They referred to the preamble of that act, and also to the resolutions of February 1777, No. 1, March 1778, No. 1, and 1790, No. 8, defining the powers and duties of the auditor general.

2. That the legislature had a right to impose new and additional duties and services of a judicial nature upon the courts and judges after their appointment; that it had a right to repeal, modify, or change the law of the land, whether the burthens of the courts or judges were lessened, added to, or varied, or not; and this in regard to all the objects of the law, criminal, common law or equity law. They referred to the *Decl. of Rights*, 3d sect. *Const.* 10th and 11th sect.

3. That the duties enjoined upon the chief judge of the third judicial district, or upon the county courts of that district, by the acts of 1806, *ch. 55*, and 1811, *ch. 189*, being judicial powers, could rightfully be imposed upon

JUNE 1821.

The State
vs
Chase

the judges or courts of the several districts. They referred to the acts of 1723, *ch. 12*; 1774, *ch. 28*; 1763, *ch. 23*, *s. 5*; 1785, *ch. 49*; 1791, *ch. 78*; 1792, *ch. 63*; 1814, *ch. 55*; 1814, *ch. 94*, and 1816, *ch. 193*, *s. 16*. *Whetcroft vs. Dorsey*, 3 *Harr. & M'Hen.* 357. *Johnson vs. The State*, *Ibid* 223. *Hayburn's case*, 2 *Dall. Rep.* 409.

4. That the legislature might impose local and *peculiar judicial* duties upon any particular court, or a particular judge of any court. They referred to the several acts of assembly requiring the county courts, bordering upon the *Potomac*, to take cognizance of abuses practised upon the navigation of that river; the county courts bordering upon the *Susquehanna* to take cognizance of encroachments upon the fisheries, &c. and of *Baltimore* county court, in a peculiar manner, administering the ordinances of the city of *Baltimore*; also the acts of 1796, *ch. 68*, *s. 9*; 1813, *ch. 126*, *s. 2*; 1814, *ch. 94*, *s. 3*; 1815, *ch. 215*, *s. 2*; 1816, *ch. 151*, *s. 1*, and 1817, *ch. 148*, *s. 6*, 10.

5. That no services, especially judicial, which the legislature could rightfully exact of any court or judge, a permanent salary being established for the judges, could lay the foundation of an implied *assumpsit* on the part of the state, that any other or further compensation should be, or ought in law to be paid. They referred to the *Decl. of Rights*, 30th *sect.* and the act of 1805, *ch. 86*.

6. That, supposing there were no other objections, there was nothing in the nature of the duties, or of the burthensomeness of the services, or of any other circumstances connected with this controversy, which entitled the defendant in error to expect or demand additional compensation. They referred to the act of November 1779, *ch. 24*, *s. 4*, where duties similar to those imposed by the act of 1805 *ch. 55*, *s. 1*, were cast on the general court, which law was acted under in *Quynn vs. Staines*, 3 *Harr. and M'Hen.* 128; and opinions given by that court, when requested by the chancellor, as in *Ridgely vs. M'Laughlin*, 3 *Harr. and M'Hen.* 220. *Russell and Lux vs. Falls*, *Ibid* 457. *Ridgely vs. Howard*, *Ibid* 321. *Cheston vs. Page*, 4 *Harr. and M'Hen.* 471. *Land Hold. Ass.* 384, 403. *Clarke vs. Ray*, 1 *Harr. and Johns.* 318. *Manro vs. Gittings and Smith*, *Ibid* 492. *Lowe vs. Maccubbin*, *Ibid* 550. They also referred to *Chandler vs. The State*, (*ante* 284.)

JUNE 1821.

The State
vs
Chase.

7. That under the *third* bill of exceptions, the services alleged to be performed by the defendant in error, were under the act of 1805, *ch. 65, s. 19*, which passed *prior* to his appointment, and consequently he accepted the office with a knowledge, and therefore the implied assent, that he would be called upon to perform those duties.

Magruder, T. B. Dorsey and Marriott, for the defendant in error, contended—1. That under the act of 1786, *ch. 53*, this action might be sustained against the state, that act, they contended, was general, giving the right to all descriptions of persons to proceed under it. They referred to 19 *Vin. Ab. tit. Statute*, 519, 520, 522, 528, as to the rules to be observed in the construction of statutes. The act of 1786, *ch. 49, s. 4*. And to show that under the act of 1786, *ch. 53*, similar suits had been brought against the state, they referred to *Nicholson vs. The State*, 3 *Harr. and M. Hen.* 109. *Tschudy vs. The State*, 3 *Harr. and M. Hen.* 1. *Dugan vs. The State*, in 1790. *Dorsey vs. The State*, 4 *Harr. and M. Hen.* 165. *Clarke vs. The State*, in 1788. *Chase vs. The State*, in 1810. *Green vs. The State*, in 1810; and the act of 1799, *ch. 79, s. 7*.

2. That the acts of 1806, *ch. 55*, and 1811, *ch. 189*, imposed duties on the defendant in error which were not imposed on any other judge, and which he was not bound to perform, having been imposed after his appointment; but that having performed them, he was entitled to be compensated therefor. They cited *Chandler vs. The State*, per *Johnson, J.*

3. That it was not contended that the defendant in error could claim compensation for any services performed by him under the act of 1805.

BUCHANAN, J. delivered the opinion of the court. By the act of 1805, *ch. 65, s. 19*, it is enacted, “that in all cases where the chancellor is or may be interested, and where bills in chancery may properly lie, the chief judge of the district, in which the chancery court shall sit, shall hear, determine, order and decree thereon, in the same manner as if such chief judge was the chancellor; and an appeal may lie in such cases, from the decree of the judge to the court of appeals,” &c.

The act of 1806, *ch. 55, s. 1*, directs, “that in any suit in the chancery court, in which the chancellor for the time

JUNE 1821.

The State
vs
Chase

being may have been counsel, or have given his opinion, and on that account may conceive that he cannot conscientiously act thereon, and shall so certify in writing, the same shall be heard and determined by the chief judge of the third judicial district, or by the court thereof, at the election of the complainant, and all interlocutory, and other orders, in such cases, shall be made by the said chief judge, which determinations and orders shall have the same effect, as if made by the chancellor, and such decree shall be subject to appeal in like manner."

The *second* section of the same act authorises the chancellor to require the opinion of the chief judge of the third judicial district, on any question of law which may arise in any suit in chancery, and in which, according to the usual practice, such opinion may be thought necessary; and declares it to be the duty of the said judge, to express in writing such opinion. And the act of 1811; *ch.* 189, gives to respondents, the same benefits and advantages that are given to complainants by the *first* section of the act of 1806, *ch.* 55.

From the facts set out in the first bill of exceptions, it appears that the defendant in error was appointed chief judge of the third judicial district, on the 27th day of January in the year 1806, and has ever since held the office, and acted as such; and that after his appointment, and entering upon the duties of his office, and during the recess of the courts, he performed sundry duties, in passing orders and decrees, and giving opinions, under and in virtue of the provisions of the several acts of 1805, *ch.* 65, *s.* 19, 1806, *ch.* 55, *s.* 1, 2, and 1811, *ch.* 189, to recover a compensation for which this suit was brought.

It is contended, on the part of the state—1. That no action can be maintained against the state, in cases of this description, under the authority of the act of 1786, *ch.* 53, by which the state is rendered liable to be sued at the instance of individuals; and 2. That the services rendered by the defendant in error, furnish no consideration from which an assumpsit on the part of the state can be implied.

We have given to this case the attention that it merits, and think there is nothing in the first objection. The act of 1786 has so long, and so often been practiced upon, that it is not now thought to be open to construction. But on full consideration we are of opinion, that the second

JUNE 1821. objection is fatal, and that there is error in the opinion of the court below on each of the bills of exceptions.

The State
vs
Chase

We hold it to be perfectly clear, that the legislature may rightfully and constitutionally, impose upon the judges any new and additional judicial duties, which the varying circumstances of the state may require; or which, suggested by experience, may in their judgment be deemed necessary to the due administration of justice.

Such a right is inseparable from the genius of our institutions, and from the very nature of things it must be so; if it were otherwise, courts of justice would answer but half the purposes of their institution; and all judges are supposed to accept their appointments, with a knowledge, and tacit consent, that their labours may from time to time be increased or diminished, according to public exigency—seldom diminished to be sure, though sometimes increased with no very sparing hand.

New judicial duties may often be unnecessarily imposed, and services, not of a judicial nature, may sometimes be required. In the latter case, a judge is under no legal obligation to perform them. But in the case before us, the duties imposed upon the defendant in error, by the acts of 1805, *ch.* 65, *s.* 19, 1806, *ch.* 55, *s.* 1, 2, and 1811, *ch.* 189, were of neither of those descriptions, but were strictly of a judicial character, and required to be performed by him in his judicial capacity, with an appeal from his decree; and were necessary to be imposed on some judge or tribunal, other than the court of chancery; owing to the peculiar situation of the cases intended to be provided for.

They are stated in the exceptions to have been performed by the defendant in error as chief judge of the third judicial district, and are so charged in the account filed by him, and sent with a short note to the attorney general, as directed by the act of 1786, *ch.* 53, nor could they have been performed in any other character.

Considered, then, as judicial services, rendered by a judge, (who is a salary officer,) in his judicial capacity, we think, that he has no legal claim to a compensation for them, (recoverable in a court of justice,) beyond the salary that is fixed by law, and which it is admitted has been regularly paid.

JUNE 1821.

The State
vs
Chase

By the thirtieth article of the declaration of rights, it is provided, "that salaries liberal, but not profuse, ought to be secured to the chancellor, and the judges, during the continuance of their commissions, in such manner, and at such time, as the legislature shall hereafter direct, upon consideration of the circumstances of this state."—Hence the compensation claimed, is obviously that, which *as a salary*, does not fall within the province of a jury, or any other tribunal but the legislature to ascertain, the subject of salaries, being exclusively, and for wise purposes, entrusted to the legislature alone; and as a compensation over and above his salary, for services rendered in his official capacity, is not recoverable in an action of assumpsit by a salary officer, as settled in the case of *Chandler vs. The State*, (*ante* 284.)

By the act of 1805, *ch.* 86, *s.* 2, the salaries of the chief judges of the several districts are fixed at \$2200 per annum, to be paid quarterly—and by the *third* section it is enacted, "that the said judges shall receive no other or further compensation than what is allowed in this act." How then, can the services rendered by the defendant in error, furnish any foundation, in the absence of any other act of legislation on the subject, from which an assumpsit on the part of the state can be implied, when that law expressly interdicts any other compensation than the salary allowed? The law is consistent, and will not raise an implied assumpsit against its own inhibition, which operates as an exclusion of an implied contract.

It is not deemed material under which of the acts the services of the defendant in error were rendered. The act of 1805, *ch.* 65, which imposes certain duties on the chief judge of the district, in which the chancery court might sit, was passed before he received his appointment, and when he accepted his commission, he took it *cum onere*; for any services, therefore, done under that act, he would, on no principle, be entitled to recover a compensation in a court of law; and his claim for services rendered under the acts of 1806, *ch.* 55, and 1811, *ch.* 189, is subject to the objections before stated.

In this view of the case, we think, that the defendant in error is without redress in a court of law, and can only

JUNE 1821. obtain remuneration at the hands of the legislature, and are therefore constrained to reverse the judgment.

Ferris
vs
Walsh

JUDGMENT REVERSED.

COURT OF APPEALS, JUNE TERM, 1821.

FERRIS vs. WALSH.

Whether the plaintiff made a contract to guarantee the payment of money due from F. to the defendant, must depend upon the letters and written evidence in the cause, and is a question of law to be decided by the court.

Where A had sold tobacco for B to F. on a credit, and taken his note therefor, B, desirous of realizing the money due from F, addressed a letter to A, requesting him to state upon what terms he will guarantee the proceeds of his tobacco, and to say for what sum he might draw, if those terms were accepted by him, A, in answer, states the amount due to B, and authorises him to draw for that amount after deducting interest with 9 per. ct exchange on a part thereof, making no mention of the subject of guarantee. B makes the deductions, and draws on A for the balance, which was paid by A. C, having failed, no part of his note, when it became due, was paid; and in an action by A to recover from B the money paid on B's draft—Held, that A contracted with B to guarantee the payment of the money due from F for the tobacco sold.

APPEAL from Baltimore county court. This was an action of *assumpsit*, and the declaration contained counts for work and labour, the common money counts, and a count on an *insinul computassent*. The general issue was pleaded. At the trial below, the plaintiff (now appellant,) gave in evidence, that on the 12th of March 1816, an account was stated and agreed to between the plaintiff and defendant, stating the nett proceeds on the sales of four hogsheads of tobacco, sold by the plaintiff for the defendant in New York, to be \$423 74, and charging the defendant with goods per invoice, and crediting the sales on the tobacco due the 6th of May 1816, and \$25 cash received, making a balance due to the defendant of \$118 39. The four hogsheads of tobacco mentioned in the account, were sold by the plaintiff, as a commission merchant, for the defendant, to J. and J. P. Foote, on the 6th of January 1816, on a credit of four months, for which they gave their promissory note payable to the plaintiff or order. He further gave in evidence, that it is the custom of commission merchants, when they sell goods on a credit, and take notes from the purchasers, to give their principals or consignees credit for the amount of the notes, after deducting the commission for selling, and other expenses; and in case the purchaser fails, and the notes are not paid at their maturity, to debit their employer with so much of the debt as is lost. That the ordinary commission for selling tobacco in New York, is two and an half per cent. That J. and J. P. Foote failed in business about the 9th of May 1816, the time when their note became due, and no part of it was paid to the plaintiff. That the defendant, on the 5th of March 1816, wrote a letter to the plaintiff, in which he says, "I am desirous of realizing the small balance in your hands to obtain the present favourable rate of exchange on New York, and for that purpose I wish you to state in reply, what you will charge for guarantee and discount on

JUNE 1821.

Ferris
vs
Walsh

the proceedings of my tobacco, and the amount for which I might draw, in case the terms offered are accepted." On the receipt of this letter, the plaintiff stated the account herein before set forth, and at the same time addressed a letter to the defendant, dated the 12th of March 1816, informing him that he had made up his account, and that there appeared a balance in his favour of \$118 39, and for which sum he might draw on him, deducting the interest for the probable time he might pay it, together with nine per cent exchange on \$25. The defendant, in answer to this letter, wrote to the plaintiff on the 17th of March 1816, stating that he thought he was a little hard on him to require nine per cent deduction on the \$25, especially as he ought to have some commission for the advance, and could not possibly get more than eight per cent. However, as the matter was small, and he thought he was entitled to some difference in the money, and interest on the balance to the 11th of May, he had drawn a bill for \$116, which allowed \$2 39 for those purposes. The defendant at the same time drew a bill on the plaintiff in favour of J. M. or order, for \$116 at one day's sight, which the plaintiff paid. The plaintiff again wrote a letter to the defendant, on the 10th of May 1816, informing him of the stoppage of Messrs. *Foote*, to whom the defendant's tobacco was sold, and that their note remained in bank unpaid; and on his calling on them, they stated their stoppage to be merely temporary, and that they would be able to pay all their creditors. In this letter he asks, "will you remit me the amount of the note, or would you prefer my drawing on you at a few days sight? Be pleased to let me know." To which the defendant, on the 18th of May 1816, replied, "Since my letter of 5th March, and your reply thereto, I have not considered myself as interested in the tobacco sales. You never apprised me to whom my tobacco was sold, that I could judge and act for myself; and my letter of the 5th March was expressly written to realize the same without further risk, and I therein asked you what you would allow me to draw for guarantee, interest, &c. included. You replied \$118 39, including nine per cent on \$25. From that day I considered all accounts closed between us conclusively. However, as you expect those men will pay, this subject can be discussed when your actual loss is known." The plaintiff also gave in evidence, that no guarantee commis-

JUNE 1821. *Ferris vs Walsh* sion was charged by him to the defendant. The defendant then moved the court to direct the jury, that if they believe the facts so admitted, and given in evidence, that the plaintiff is not entitled to recover. Which opinion and direction the court, [*Dorsey*, Ch. J. and *Ward*, A. J.] gave to the jury. The plaintiff excepted, and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, EARLE, JOHNSON and MARTIN, J.

Raymond, for the appellant, contended—1. That as there was evidence applicable to the issue before the jury, it was not competent for the court to withdraw the question of fact from the jury; and the court having done so in point of fact by their instruction, it was error. 2. That admitting the court had a right to decide the question of fact upon the evidence, or what was equivalent to doing so, to instruct the jury how they must find their verdict, the court erred in deciding the question of fact; and that upon the evidence in the record, the verdict ought to have been in favour of the plaintiff. On the *first point* he cited 1 *Phill. Evid.* 13; and on the *second point* he cited 2 *Esp. Dig.* 590.

Winder argued for the appellee.

MARTIN, J. delivered the opinion of the court. Two questions are presented for the consideration of the court in this case:

1st. Whether it was the province of the court, or of the jury, to decide on the liability of the plaintiff to pay the money due from *J. and J. P. Foote* to the defendant? And 2d. If the construction given to the contract by the court be correct?

Whether the plaintiff made a contract to guarantee the payment of the money due from Messrs. *Foote*, for the tobacco sold to them on account of *Walsh*, must depend upon the letters and written evidence in the cause, and is a question of law to be decided by the court, and not a fact to be submitted to the jury. This doctrine is too well established, both by authority and universal practice, to admit of doubt. A similar question was decided in the case of *Macbrath* against *Haldimand*, in 1 *Term. Rep.* 180, where Lord *Mansfield* observes, "It was objected,

whether the defendant had made himself liable or not was JUNE 1821.
 a question which ought to have been left to the jury to decide. But there was no evidence which was proper for their consideration; for the evidence, consisting altogether of written documents and letters, which were not denied, the *import* of them was matter of law and not of fact."

Ferris
vs
Walsh

To form an opinion upon the second question, a reference to some part of the testimony in the record will be necessary to show the situation of the parties at the time their correspondence by letters commenced. *Ferris* was a commission merchant in *New-York*, and *Walsh* acted in the same capacity in *Baltimore*. In October 1815, *Walsh* was indebted to *Ferris* for a quantity of cheese sold by him on account of *Ferris*, and in January 1816, *Ferris* sold for *Walsh* four hogsheads of tobacco, to Messrs. *J. and J. P. Foote*, on a credit of four months. There being unliquidated accounts between the parties, and the note given by Messrs. *Foote* not having arrived at maturity, on the fifth of March 1816 *Walsh* addressed a letter to *Ferris*, in which he expresses a desire to realize the balance due him in the hands of *Ferris*, and to obtain a guarantee of the payment of the money still due from the Messrs. *Foote*. He begs *Ferris* to state upon what terms he will guarantee the proceeds of his tobacco, and concludes by requesting, if *Ferris* will guarantee the debt, he will say upon what terms, and for what amount *Walsh* might draw, if those terms were accepted by him. On the 12th of March following, an answer is sent by *Ferris* to this letter, in which he states the balance due to *Walsh* to be \$118 39, and authorises him to draw for the amount due, after deducting the interest from the probable time he might pay it, with nine per cent exchange on the sum of \$25, that *Walsh* had advanced for him; although *Ferris* does not mention the subject of guarantee, he assents to the proposition contained in *Walsh's* letter, states the terms on which he did assent to them, and directs *Walsh* to draw for the balance, after deducting the interest and exchange; thus affording the specific evidence required by *Walsh*, if the proposition made by him should be accepted by *Ferris*. The terms of the contract being thus understood by both parties, *Walsh*, on the 16th of March, drew a bill of exchange on *Ferris* for \$116, the amount due him after deducting the interest and exchange, as stated in the letter.

JUNE 1821. of *Ferris*, and *Ferris* honoured the bill. The guarantee of *Foot's* debt constituted an essential part of the proposed contract in *Walsh's* letter, it was assented to by *Ferris*, and the payment of the bill of exchange consummated the contract. The court are therefore of opinion, that the construction given to those letters by the court below is correct, and their judgment is affirmed.

Hughes
vs
Milly

CHASE, Ch. J. dissented.

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1821.

HUGHES vs. NEGRO MILLY, et. al.

M, by her will in 1776, bequeathed to P a negro girl, named A, (the ancestor of the petitioners, then 15 years of age,) until she should arrive to the age of 21, and that he should manumit her immediately after the death of M, so that her freedom might be secured to her at the age of 21. M devised the residue of her estate to S, and died in 1786. S administered on her estate, and in 1819, by deed, he manumitted the petitioners, the descendants of A, born after the death of the testatrix, stating in his deed that P had neglected to do so. — Held that they were entitled to freedom.

Under the act of 1782, ch. 1, manumission by last will, was effectual to give freedom to slaves, if not made during the last sickness of the testator.

APPEAL from *Harford* county court, on a petition for freedom filed by the appellees. At the trial the petitioners offered evidence, that *Margaret Coale* being possessed of a negro girl called *Prina*, aged fifteen years, made, on the 23d of May 1776, her last will and testament in writing, wherein among other bequests she bequeathed as follows, viz. 1st. "I give and bequeath unto my son, *Philip Coale*, my negro girl named *Prina*, until she arrives to the age of twenty-one years, being at this time about fifteen years of age, and I do order him, that immediately after my decease he manumit her, and her posterity, so that their freedom may be secured to them at the age of twenty-one years." 3d. "I give and bequeath unto my son, *Samuel Coale*, all the remainder part of my estate after my son *Philip*, and my daughter *Sarah*, hath received their legacies as above," &c. That *Margaret Coale*, died in the year 1786. and that *Samuel Coale*, her son, one of the legatees mentioned in the said will, took out letters of administration, with the will annexed, on the estate of the said *Margaret Coale*, his mother. And on the 3d of March 1819, executed a deed of manumission to the petitioners, as follows, viz. "Whereas my mother, *Margaret Coale*, in her last will and testament, commanded my brother, *Philip Coale*, to secure by manumission the freedom of her slave *Prina*, and her offspring, which command the said *Philip* neglected to execute; and whereas by a subsequent clause of the same will, (through the said *Philip's* omitting to execute the said manumission,) the said *Prina*, and her

onspring, became my property, being a part of the residue of my mother's estate bequeathed to me by the said will; therefore, in conformity to my mother's wish towards her slaves, as well as to my own feelings of justice towards members of the human family, I hereby manumit, and for ever set free, *Milly*, (daughter of *Prina*), and her children, *Washington* and *Hannah*; *Hannah* (daughter of *Prina*), and her children *Henry*, *Joe* and *Susan*; *Susan*, (daughter of *Prina*), and her daughter *Betsey*, and *Fanny* daughter of *Sally*, and grand-daughter of *Prina*." &c. That the petitioners *Milly*, *Hannah* and *Susan*, stated in the petition to be mothers, are the daughters of *Prina*, and were born after the death of *Margaret Coale*, and that the petitioners, *Hannah* and *Washington*, are the children of *Milly*, and that the petitioners, *Henry*, *Joseph* and *Susan*, are the children of *Hannah*, the daughter of *Prina*, and that the petitioner *Betty*, is the child of *Susan*, daughter of *Prina*, and that the petitioner *Fanny* is the daughter of *Sarah*, who was the daughter of *Prina*, which said *Sarah* was born after the death of *Margaret Coale*. The petitioners then moved the court to direct the jury, that if they believed the foregoing testimony, they must find a verdict for the petitioners; which opinion and direction the court, [*Dorsey*, Ch. J.] gave to the jury. The defendant excepted; and the verdict and judgment being for the petitioners, the defendant appealed to this court.

JUNE 1821.

Hughes
vs
Milly

The cause was argued before BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

Taney, for the appellant, contended—1. That under the bequest to *Philip Coale* the petitioner's ancestor was bequeathed absolutely to him, and no right to her could pass to *Samuel Coale* under the bequest to him. He cited *Goodtitle vs. Otway*, 2 Wils 6. 2. That under the act of 1752, ch. 1, no will could be made to give freedom to slaves.

Raymond and *R. Johnson*, for the appellees, stated that the claim of the petitioners to freedom was on two grounds. 1. Under the will of Mrs. *Coale*; and 2. Under the deed of manumission executed by *Samuel Coale*. They contended, 1. That an administrator might manumit the slaves of the intestate. 2. That when the testatrix died, the time had elapsed when *Philip* could take under the

JUNE 1821.

{
Ford
vs
Philpot

bequest to him, that it was a lapsed bequest, and the slaves passed to *Samuel* under the bequest to him. 3. That manumission by will was not prohibited by the act of 1752, *ch.* 1, unless made during the last sickness of the testatrix. 4. That as *Philip* could not take the slaves, they passed to *Samuel*, who in due form manumitted them. That the bequest to *Philip* was in trust, which trust devolved upon *Samuel* to execute.

THE COURT OF APPEALS affirmed the judgment of the county court:

COURT OF APPEALS, JUNE TERM, 1821.

FORD, *et al.* vs. PHILPOT, *et al.*

A mortgagor is considered the substantial owner of the property mortgaged, and he is capable of transferring or vesting his interest at his own pleasure so long as the right of redemption exists.

The interest which a mortgagor had in lands mortgaged by him, was, before the acts of 1795, *ch.* 56, and 1810, *ch.* 160, liable to be attached, condemned, and sold under a *fieri facias*.

Whether or not in permitting a mortgagor, out of possession, to redeem, he can be compelled to pay, in addition to the mortgage debt, the value of extensive, permanent, and beneficial improvements placed on the land by the mortgagee? *Quere.*

APPEAL from the Court of Chancery. The cause, which appears to be sufficiently stated in the opinion delivered by this court, was argued before JOHNSON, MARTIN and DORSEY, J.

Pinkney and *Winder*, for the appellants, raised two questions. 1. Had the complainants (now appellants,) a right to redeem a mortgage executed in 1754 under a bill filed in 1809? And, 2. If they had, were they responsible for the improvements made on the premises by the mortgagee, and those claiming under him?

1. They stated, that the chancellor had decreed that the complainants, might redeem on payment of the mortgaged debt, and the value of the improvements made on the premises, as ascertained by the auditor. They contended, that the equity of redemption of the premises could not be affected by the judgment for attachment against *Ford*, (the ancestor of the complainants,) the condemnation and sale under the *fieri facias* thereon. They referred to *Scott vs. Scholey*, 8 East, 467. *Metcalf vs. Scholey*, 5 Bos. & Pull. 461. *Lyster vs. Dolland*, 1 Ves. jr. 431. 1 Pow. on Mort. 339. 1 Madd. Chan. 413. *Campbell vs. Morris*, 3 Harr. & M'Hen. 535; and *Pratt vs. Law & Campbell*, 9 Cranch, 478, (Mr. Key's argument.) That under the act of 1715, *ch.* 40, goods and chattels only could be affected by an attachment. That even if third persons could, under an attachment, affect the mortgaged premises, yet the mortgagor could not, as his remedy was solely in chancery. 1 Madd. Chan.

421. *Perry vs. Barker*, 8 *Ves.* 527. 15 *Ves.* 198, S. C. JUNE 1821.

That the assignees of the mortgagee stand in the same situation of the mortgagee, and are affected by all the rights of the mortgagor to redeem, and with notice, &c. 1 *Madd. Chan.* 435, 436, 432, 433. 1 *Vern.* 484. 2 *Ves.* 185. 1 *Atk.* 489, 522. That the complainants had a right to redeem, they referred to 5 *Bac. Ab. tit. Mortgage*, (E. 6) 90 to 95. 1 *Madd. Chan.* 414, 415.

2. To show that the mortgagee was not entitled to the value of the improvements placed on the premises, they referred to 5 *Bac. Ab. tit. Mortgage*, (F) 103, 104. (C) 18. 1 *Madd. Chan.* 426.

Magruder, for the appellees, contended, that the decree ought to be affirmed, 1. Because after possession for such a length of time by the mortgagee and those claiming under him, the complainants were not entitled to relief. 2. Because the attachment, judgment of condemnation, *fieri facias*, and sale under it, divested all interest which *Ford*, and those claiming under him, ever had in the land, and of course the complainants were not aggrieved by the decree. 3. Because the auditor's account was correct, and the defendant (*Woods*,) was entitled to the credits allowed him.

Upon the *second point*, and to prove that a mortgagor's equitable interest could be taken under an attachment, and that a sale thereof, after a condemnation, and under a *fieri facias*, was valid, he referred to *Campbell vs. Morris*, and *Pratt vs. Law and Campbell*. That if the complainants had a right to redeem, it could be done only by their paying the mortgage debt, and for all the improvements made on the premises. He cited *Newling vs. Abbott*, *Vin. Ab.* 185, *Ca.* 8, (A,) and *Helms vs. Langley*, where Chancellor *Hanson* allowed for the value of improvements placed on the mortgaged premises by the mortgagee.

JOHNSON, J. delivered the opinion of the court. A bill in chancery was filed by the appellants in 1809, claiming, as the assignees of a mortgagor, a right to redeem from the assignees of the mortgagee, the property in question, on the payment of the sum due. The Chancellor passed a decree, by which he sustained the right to redeem, on the payment of the debt, together with the value of extensive permanent and beneficial improvements, placed on the premises by the assignee

Ford
vs
Philpot

JUNE 1821.

Ford
vs
Philpot

of the mortgagee since he obtained the possession; and, unless the debt and improvements were paid by the time limited in the decree, the bill should be dismissed. From this decree an appeal is made. As the complainants did not accede to the terms of the decree, by the payment of the sum ascertained to be due, the latter part of the decree, (by which the bill was to be dismissed,) had its operation.

On the appeal to this court, two questions arise. *First*—Had the complainants a right to redeem? And *Second*—If they had, were they responsible for the improvements made on the premises? To form an opinion on the first question, we must necessarily turn our attention to the facts, as disclosed by the record.

John Bassey, the proprietor of the property in question, in the year 1754, mortgaged the same to one *Brian Philpot*, and also executed another mortgage to one *Larsh*, in the year 1763. The mortgagor remained in the possession of the premises, and in the year 1773, conveyed the same, by an absolute deed, to *Thomas Ford*, under whom the complainants claim, who obtained, and held the possession until his death in the year 1776; and on his death the complainants, his heirs at law, held the land until the year 1789. *Philpot*, the first mortgagee, transferred his interest to *Larsh*, the second mortgagee. Before *Larsh* became entitled to the whole of the mortgage debt, *Ford*, who was entitled to the equity of redemption, in the year 1786 adjusted the mortgage debt, and by way of collateral security gave his bonds for the amount then due. On the bond to *Larsh* a suit was brought, and on the return of two *non ests*, under the act of 1715, *ch.* 40, a judgment for an attachment was obtained, the property in question returned as attached, a judgment of condemnation thereon rendered, on which a *feri facias* issued in October 1789, and the property was sold to *Samuel Hughes* and *John Swan*. *Samuel Hughes*, one of the persons to whom the sale was made, in the year 1793 obtained a deed from *Larsh*, who then held the whole interest of the mortgagees; and of course, if the sale, under the *feri facias*, was competent to transfer the mortgagor's right of redemption, (or if he had before acquired the interest of *Swan* his co-purchaser,) he had vested in him both the legal and equitable title to the property in contest. The possession of the land, must be inferred to have been obtained by the purchasers at the

sheriff's sale, or soon after that transaction; for, from that time, *Ford* is no longer found on the premises. In the year 1801, *Samuel Hughes* sold the property to *William Woods*, one of the defendants, who entered on the same, and lived there when the bill was filed. *Woods* made the improvements, for which, by the decree of the Chancellor, he was to be paid, before he could be divested of his interest.

JUNE 1821.

Ford
vs
Philpot

The mortgagor is considered the substantial owner of the property mortgaged; the debt due, is all the mortgagee, or those claiming under him, can demand; and, altho' the legal estate is in the mortgagee, it is merely to secure the payment of the debt, and that effected, the mortgagor must be restored to his original condition, the unfettered owner. There is no necessity to detail the extent of the interest of the mortgagor after the time limited for the payment of the debt has elapsed; it may suffice to say, that except no right of dower can arise, (and for this exception no substantial reason can be given, and now no longer exists,) on the mortgagor's interest, he is capable of transferring, or vesting his interest, at his own pleasure; nor can he be deprived of this capacity so long as the right of redemption exists. The property mortgaged is substantially his—liable to the incumbrance of the debt; subject to that responsibility he can sell it to meet any other claims, or demands, to whom he pleases; and without his permission, and against his will, it may be withdrawn from him in the discharge of his debts, by a decree and sale, under the authority of a court of equity; and since the year 1810, it is expressly made responsible at law for his debts, as well as any other equitable interest a debtor may be entitled to.

But, was it susceptible of being taken under the attachment in the year 1789, and could it be disposed of, under the *fieri facias*?

If it be conceded, that in *England* the right of redemption cannot be taken in execution and sold by a *fieri facias*; that is, the equity of redemption in chattels real, and that, before the year 1810, in this state, a *fieri facias*, on mere common law judgments, would not reach such property; yet, it will not follow, that it may not be approached, or made liable to an attachment. There are no words or expressions in the attachment law of 1715, *ch. 40*, confining its operation to such property as could be affected by

JUNE 1821. *feri facias*, on ordinary or common law judgments. Its language is, to award an attachment "against the goods, chattels and *credits*." By what process at law could the "*credits*" of a judgment debtor be affected? The writ of *feri facias* could not meet them; and, if they could be made responsible, the aid of a court of equity must be solicited; and when the act caused one interest to be affected at law, to the discharge of a judgment at law, it is not presumed that any reason exists for excluding any other property belonging to the debtor from the same liability.

Forl
vs
Philpot

The language of the act of 1715, *ch.* 40, and that of the act of 1795, *ch.* 56, the supplement to the first, connected with the exposition given to the first act, in consequence of the statute of 5 *Geo.* II, (which passed in the year 1732,) are the same. The first makes answerable to the attachment, "goods, chattels and credits;" the last, "lands, tenements, goods, chattels and credits;" and, as the supplement to the first attachment law passed long after the statute of 5 *George* II, that statute could not affect its construction; and therefore, as lands and tenements, which by the act of 1715, after the statute of 5 *George* II, were, by construction, made liable to attachments, in order to make the supplement co-extensive with the original, they are expressly inserted.

As then the two laws on the subject of attachments are the same; that is, so far as extends to the species of property subject to their operation, the construction given to the one must apply to the other.

It appears in itself but just, that the interest which a mortgagor has in property mortgaged by him should be liable, as well at law as in equity, for his debts, and there appears no force in the objection, that it is not at law subject to a *feri facias*, because it is not tangible; for the *right* itself, whether legal or equitable, is not tangible, but the land is; and by the sale, the interest of the party either legal or equitable, may well pass; if a legal interest, and the party in possession will not give it up, the purchaser is driven to his ejectionment; and if only equitable, to get possession he must resort to a court of equity, where, if the sale under the *feri facias* passed the right, he would not only obtain the possession, but the legal estate also.

And as it appears by the judgment of the court of appeals in the case of *Campbell vs. Morris, S Harr. & M. Hen.*

535, that the equity of redemption may be sold under an attachment issued in virtue of the supplementary act, and as the original and supplement are the same, as to the property to be affected, and as the court are not in the slightest degree disposed to question the propriety of the decision made in the case mentioned, they are drawn to the conclusion, that whatever interest *Ford* had to the land, passed from him by the attachment, condemnation and sale; and of course, when his representatives filed the present bill, they had not the redeeming power vested in them.

As then the complainants had no right to redeem, there is no necessity to express an opinion on that part of the case respecting improvements. The decree, therefore, dismissing the bill, is affirmed.

DECREE AFFIRMED.

COURT OF APPEALS, DECEMBER TERM, 1821.

THE STATE *vs.* BUCHANAN, *et al.*

ERROR to *Harford* county court. In this case an indictment was found in *Baltimore* city court against the defendants in error; and on their suggestion, supported by affidavits, that a fair and impartial trial could not be had, &c.

A writ of error lies at the instance of the state in a criminal prosecution

A transcript of the record, certified under the hand of the clerk and seal of the court,

with the writ of error annexed, is a legal and sufficient return to such writ of error.

The offence of conspiracy is of common law origin, and not restricted or abridged by the statute 33 Edward I.

A conspiracy to do any act that is criminal *per se*, is an indictable offence at common law.

An indictment will lie at common law, 1. For a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only. 2. For a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public. 3. For a conspiracy to extort money from another, or to injure his reputation by means not indictable if practised by an individual, as by verbal defamation, and that whether it be to charge him with an indictable offence or not. 4. For a conspiracy to cheat and defraud a third person, accomplished by means of an act which would not in law amount to an indictable cheat, if effected by an individual. 5. For a malicious conspiracy to impoverish or ruin a third person in his trade or profession. 6. For a conspiracy to defraud a third person by means of an act not *per se* unlawful, and though no person be thereby injured. 7. For a bare conspiracy to cheat or defraud a third person, though the means of effecting it should not be determined on at the time. 8. A conspiracy is a substantive offence, and punishable at common law, though nothing be done in execution of it.

In a prosecution for a conspiracy, it is sufficient to state in the indictment, the conspiracy and the object of it: and the means by which it was intended to be accomplished need not be set out.

Every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious, or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is at common law an indictable offence, though nothing be done in execution of it, and no matter by what means the conspiracy was intended to be effected; which may be perfectly indictable, and makes no ingredient of the crime, and therefore need not be stated in the indictment.

Our ancestors brought with them the laws of the mother country, so far at least as they were applicable to their situation, and the condition of an infant colony. They were in the predicament of a people discovering and planting an uninhabited country. And if they brought with them the common law of conspiracy, they brought it as it is now settled and known in *England*. It is to judicial decisions that we are to look for the evidences of the common law.

The third section of the Bill of Rights has reference to the common law in mass, as it existed here, either potentially, or metacally, and as it prevailed in *England* at that time, except such portions of it as are inconsistent with the spirit of that instrument, and the nature of our new political institutions; and it cannot be inconsistent with, or repugnant to the spirit and principles of our institutions, to correct the morals and protect the reputation, rights and property of individuals, by punishing corrupt combinations falsely to rob another of his reputation, maliciously to ruin him in his business, or fraudulently to cheat him of his property.

An indictment having two counts, the first charging the defendants with an executed conspiracy,

Dec. 1821. the proceedings were removed to *Harford* county court for trial. The indictment is as follows, viz. "State of *Maryland*, city of *Baltimore*, to wit: The jurors for the state of *Maryland* for the body of the city of *Baltimore*, on their oath present, that by an act of congress of the *United States*, passed on the tenth day of April, in the year of our Lord one thousand eight hundred and sixteen, at the city of *Washington*, entitled, "An act to incorporate the subscribers to the Bank of the *United States*" a bank was established and chartered as a corporation and body politic, by the name and style of *The President, Directors and Company, of the Bank of the United States*, with authority, power and capacity, among other things, to have, purchase, receive, possess, enjoy and retain, to them and their successors, lands, rents, tenements, hereditaments, goods, chattels and effects, of whatsoever kind, nature and quality, to an amount not exceeding in the whole, fifty-five millions of dollars, to deal and trade in bills of exchange, gold and silver bullion, and to take at the rate of six *per centum per annum* for or upon its loans or discounts, and to issue bills or notes signed by the president, and countersigned by the principal cashier or treasurer thereof, promising the payment of money to any person or persons, his, her, or their order, or to bearer. And that under and by virtue of the power and authority given to the said directors by the said act of congress, an office of discount and deposit of the said corporation was, at the time hereinafter mentioned, regularly and duly established in pursuance of the power contained in the said act, at the city of *Baltimore*, in the state of *Maryland* aforesaid, and that *George Williams*, late of the city of *Baltimore*, merchant, was at the time hereinafter mentioned, and before and afterwards, one of the directors of the said bank of the *United States* at *Philadelphia*, to wit, at the city of *Baltimore* aforesaid, and that *James A. Buchanan*, late of the city of *Baltimore*, merchant, was at the time hereinafter mentioned, and before and since, president of the said office of

The State
vs
Buchanan

falsely, fraudulently and unlawfully, by wrongful and indirect means, to cheat, defraud and impoverish the President, Directors and Company of the Bank of the *United States*; and the second charging them with a conspiracy only, falsely, fraudulently and unlawfully, by wrongful and indirect means, to cheat, defraud and impoverish the President, Directors and Company of the Bank of the *United States*;—where one of the defendants was the president of the office of discount and deposit of the mother bank, another the cashier of that office, and the other a director of the mother bank—Held, that the matter charged in each count in the indictment constitutes a punishable conspiracy at common law, and that that portion of the common law is in force in this state.

Under the constitution of the *United States* the courts of this state have jurisdiction of the offence charged in the above indictment.

On the reversal of a judgment rendered in favour of the traversers in a criminal prosecution, a *procedendo* was awarded directing a new trial.

discount and deposit of the said Bank of the *United States* Dec. 1824.
in the city of *Baltimore*, and *James W. McCulloh*, late of
the city of *Baltimore*, gentleman, was at the time herein-
after mentioned, and before and afterwards, cashier of the
said office of discount and deposit of the said Bank of the
United States in the city of *Baltimore*, to wit, at the city
of *Baltimore* aforesaid. And that the said *George Wil-*
liams, so being one of the directors of the said Bank of the
United States, and the said *James A. Buchanan*, so being
president of the said office of discount and deposit of the
said bank in the city of *Baltimore*, and the said *James W.*
McCulloh, so being cashier of the said office of discount
and deposit of the said bank in the city of *Baltimore*, be-
ing evil disposed and dishonest persons, and wickedly de-
vising, contriving, and intending, falsely, unlawfully,
fraudulently, craftily and unjustly, and by indirect means,
to cheat and impoverish the said president, directors and
company, of the Bank of the *United States*, and to defraud
them of their monies, funds, and promissory notes for the
payment of money, commonly called bank notes, and of
their honest and fair gains to be derived under and pur-
suant to the said act of congress from the use of their said
monies, funds, and promissory notes for the payment of
money, commonly called bank notes, on the eighth day of
May, in the year of our Lord one thousand eight hundred
and nineteen, at the city of *Baltimore* aforesaid, with force
and arms, &c. did wickedly, falsely, fraudulently and un-
lawfully conspire, combine, confederate and agree together,
by wrongful and indirect means, to cheat, defraud and im-
poverish, the said president, directors and company of the
Bank of the *United States*, and by subtle, fraudulent, and
indirect means, and divers artful, unlawful and dishonest
devices and practices, to obtain and embezzle a large a-
mount of money, and promissory notes for the payment of
money, commonly called bank notes, to wit, of the amount
and value of fifteen hundred thousand dollars current money
of the *United States*, the same being then and there the
property, and part of the proper funds of the said presi-
dent, directors and company, of the Bank of the *United*
States, from and out of the said office of discount and de-
posit of the said bank in the city of *Baltimore*, without the
knowledge, privity or consent of the said president, di-
rectors and company, of the Bank of the *United States*,

The State
vs
Buchanan

DEC. 1821. and also without the privity, consent or knowledge of the directors of the said office of discount and deposit of the said bank in the city of *Baltimore*, for the purpose of having and enjoying the use thereof for a long space of time, to wit, for the space of two months, without paying any interest, discount or equivalent, for the use thereof, and without securing the repayment thereof to the said corporation. And the more effectually and securely to perpetrate and conceal the same, that the said *James W. McCulloh* should, from time to time, falsely and fraudulently state, allege and represent, to the said directors of the said office of discount and deposit in the city of *Baltimore*; that such monies and promissory notes, so agreed to be obtained and embezzled as aforesaid; were loaned on good, sufficient and ample security, in capital stock of the said bank; pledged and deposited therefor; and also should from time to time make and fabricate false statements and vouchers respecting the same, and other property and funds of the said corporation, to be laid before and exhibited to the said directors of the said office of discount and deposit of the said bank in the city of *Baltimore*. And that the said *George Williams*, *James A. Buchanan*, and *James W. McCulloh*, being such officers of the said corporation as aforesaid; did then and there, in pursuance of and according to the said unlawful, false, and wicked conspiracy and confederacy, combination and agreement aforesaid, by indirect, subtle, wrongful, fraudulent and unlawful means, and by divers artful and dishonest devices and practices, and without the knowledge, privity or consent of the said president, directors and company, of the Bank of the *United States*, and without the privity, knowledge or consent of the directors of the said office of discount and deposit of the said bank in the city of *Baltimore*, obtain and embezzle a large amount of monies, and of promissory notes for the payment of money, commonly called bank notes, the same being the property and part of the proper funds of the said corporation, from and out of their said office of discount and deposit in the city of *Baltimore*, to wit, of the amount and value of fifteen hundred thousand dollars current money of the *United States*, for the purpose of having and enjoying the use thereof, and did have and enjoy the use thereof, for a long space of time, to wit, for the space of two months, without paying any interest,

The State
vs
Buchanan

discount or equivalent therefor, and without securing the repayment of the said monies, and the said promissory notes for the payment of money commonly called bank notes; and did then and there falsely, craftily, deceitfully, fraudulently, wrongfully and unlawfully, keep and convert the same to their own use and benefit, without the knowledge, privity or consent of the said corporation, and without the knowledge, privity or consent of the directors of the said office of discount and deposit in the city of *Baltimore*; and did then and there, the more effectually to perpetrate and conceal the said conspiracy, confederacy, fraud and embezzlement, cause and procure false and fraudulent representations, allegations, statements and vouchers, to be made and fabricated, and the same to be exhibited to and laid before the directors of the said office of discount and deposit in the city of *Baltimore*, by the said *James W. McCulloh*, as cashier of the said office of discount and deposit, respecting the said monies, and the said promissory notes for the payment of money, so obtained and embezzled as aforesaid, in which said representations, allegations, statements and vouchers, it was then and there falsely and fraudulently represented, alleged and exhibited, that the said monies, and promissory notes for the payment of money, were loaned on good, sufficient, and ample security, in capital stock of the said bank, pledged and deposited therefor, when in truth and in fact no capital stock of the said bank, and no other security, was pledged or deposited therefor, as the said *George Williams*, *James A. Buchanan*, and *James W. McCulloh*, then and there well knew. And that the said false, wicked, unlawful, and fraudulent conspiracy, confederacy and agreement, above mentioned, and the said false, wicked, unlawful, and fraudulent acts, done in pursuance thereof above set forth, were then and there made, done and perpetrated, by the said *George Williams*, *James A. Buchanan*, and *James W. McCulloh*, in abuse and violation of their duty, and the trust reposed in them, and the oaths taken and lawfully sworn by them respectively as such officers of the said corporation as aforesaid. And that the said *George Williams*, *James A. Buchanan*, and *James W. McCulloh*, did then and there thereby falsely, wickedly, fraudulently, wrongfully and unlawfully, impoverish, cheat and defraud, the said president, directors and company, of the Bank of the *United States*, to the

DEC. 1821.

The State
vs
Buchanan

DEC. 1821. great damage of the said president, directors and company, to the evil example of all others in like manner offending, and against the peace, government and dignity of the state of *Maryland*, &c.

The State
vs
Buchanan

And the jurors aforesaid, on their oath aforesaid, do further present, that the said *George Williams*, so being one of the directors of the said Bank of the *United States* at *Philadelphia*, to wit, at *Baltimore* aforesaid, and the said *James A. Buchanan*, so being president of the said office of discount and deposit of the said bank in the city of *Baltimore*, and the said *James W. McCulloh*, so being cashier of the said office of discount and deposit of the said bank in the city of *Baltimore*, being evil disposed and dishonest persons, and wickedly devising, and contriving; and intending, falsely, unlawfully, fraudulently, craftily and unjustly, and by indirect means, to cheat and impoverish the said president, directors and company of the Bank of the *United States*, and to defraud them of their monies, funds, and promissory notes for the payment of money, commonly called bank notes, and of their honest and fair gains to be derived under and pursuant to the said act of congress, from the use of their said monies, funds, and promissory notes for the payment of money, commonly called bank notes, afterwards, to wit, on the eighth day of May, in the year of our Lord one thousand eight hundred and nineteen; at the city of *Baltimore* aforesaid, with force and arms, &c. did wickedly, falsely, fraudulently, and unlawfully conspire, combine, confederate and agree together, by wrongful and indirect means, to cheat, defraud and impoverish, the said president, directors and company of the Bank of the *United States*, and by subtle, fraudulent, and indirect means, and divers artful, unlawful, and dishonest devices and practices, to obtain and embezzle a large amount of money, and of promissory notes for the payment of money, commonly called bank notes, to wit, of the amount and value of fifteen hundred thousand dollars current money of the *United States*, the same being then and there the property and part of the proper funds of the said president, directors and company, of the Bank of the *United States*, of and out of the said office of discount and deposit of the said bank in the city of *Baltimore*, without the knowledge, privity or consent, of the said president, directors and company of the Bank of the *United States*, and

DEC. 1821.

The State
vs
Buchanan

also without the privity, consent or knowledge, of the directors of the said office of discount and deposit of the said bank in the city of *Baltimore*, for the purpose of having and enjoying the use thereof for a long space of time, to wit, for the space of two months, without paying any interest, discount or equivalent for the use thereof, and without securing the repayment thereof to the said corporation. And that the said false, wicked, unlawful, and fraudulent conspiracy, confederacy and agreement, above mentioned, were then and there made, done and perpetrated, by the said *George Williams*, *James A. Buchanan*, and *James W. McCulloh*, in abuse and violation of their duty, and the trust reposed in them, and the oaths taken and lawfully sworn by them respectively as such officers of the said corporation as aforesaid, to the great damage of the said president, directors and company, to the evil example of all others in like manner offending, and against the peace, government and dignity, of the state of *Maryland*, &c.

Luther Martin, Attorney General of *Maryland*, and District Attorney of *Baltimore City Court*.

To which indictment there was the following *special demurrer*, viz. "And the said *James A. Buchanan*, *James W. McCulloh*, and *George Williams*, protesting, not confessing the truth of the matters and things in said indictment contained, come and defend the force, &c. when, &c. and say that the said indictment, in manner and form aforesaid above made, and the matter therein contained, are not sufficient in law for the said state to have and maintain its said prosecution against them, to which said indictment they have no need, nor are obliged by the law of the land to answer; and this they are ready to verify: Wherefore, for want of a sufficient indictment in this behalf, the said *James A. Buchanan*, *James W. McCulloh*, and *George Williams*, pray judgment, if the said state ought to have or maintain its said prosecution against them. And for causes of demurrer in law in this behalf, the said *James A. Buchanan*, *James W. McCulloh*, and *George Williams*, according to the form of the statute in such cases lately made and provided, shew to the court here these causes following; that is to say, for this, that the matters and things charged in said indictment, in manner and form as therein charged, do not import or contain any charge of crime in

DEC. 1821. law; and also that said indictment is vague, contradictory, inconsistent, and wholly insufficient in law; and also that the matters and things in said indictment contained, in manner and form as therein charged, are not cognizable by nor within the jurisdiction of this court, but are exclusively cognizable under the authority of the *United States*." The District Attorney, on the part of the state, joined in demurrer.

The State
vs
Buchanan

The County Court, [*Hanson and Ward*, A. J. (a.)] ruled the demurrer good, and discharged the defendants. The present writ of error was brought on the part of the state.

The case was argued in this court before CHASE, Ch. J. BUCHANAN, EARLE, and MARTIN, J.

Murray, (District Attorney of the sixth judicial district by substitution of *Williams*, the assistant Attorney General, with the approbation of the court,) assisted by *Wirt*, (Attorney General of U. S.) *Harper* and *Mitchell*, on the part of the state, stated, that the questions which would be presented to the consideration of the court were—

1. Whether a writ of error would lie at the instance of the state, in a criminal prosecution?
2. And if the writ of error has been properly sued out, whether the record returned in pursuance of the writ of error has been legally certified?
3. Whether the facts charged in the indictment amount to a criminal offence?
4. And if so, whether this case is cognizable in the courts of this state?

On the *first point*, they contended, that a writ of error would lie at the instance of the state in a criminal prosecution, and they referred to *The King vs. Marquis of Winchester*, *Sir Wm. Jones*, 407. *Cro. Car.* 504, *S. C.* 2 *Bac. Ab. tit. Error*, 453. 5 *Vin. Ab. tit. Error*, 479. *Cooke vs. Lainday*, *Cro. Jac.* 210. *The State vs. Messersmith & Askew*. *The State vs. Forney*. *The State vs. Brown*; and *The State vs. Durham*; all in the general court, and reversed at May Term, 1793. *The State vs. Spence* at June Term, 1817. 1 *Chitty's C. L.* 664, 747, (514,) 752. *Wilks's Case*, 4 *Burr.* 2250. 4 *Blk. Com.* 393, 398, 399. 2 *Hale's P. C.* 210, 247, 248, 393. 2 *Com. Dig. tit. Certiorari*, (A 1) 188. *The King*

(a) *Dorsey* Ch. J. dissented. The opinion of the court, and of the chief judge, are published at length in a book called "*A Report of the Conspiracy Cases*."

vs. Hedgecock in Provincial Court in 1701. *Jac. L. D. tit. DEC. 1821.*
Certiorari, 412. *Fitz. N. B.* 557, (H.) 1 *Vern.* 170, 175.

On the *second point*, they contended, that under the law, and the usage and practice of our courts, the record had been formally and legally certified. They referred to *Burke vs. The State*, in this court at June term, 1809. 2 *Harr. Ent.* 58, 226, 240, 221, 227, 263. 1 *Chitty's C. L.* 662, 749. 2 *Tidd's Pr.* 1088, 1089, 1090. *Jacob's L. D. tit. Certificate. Ibid, tit. Clerk.* The act of 1713, *ch. 4, s. 4, 5. The State vs. Messersmith*, and others, before referred to. *Cumming vs. The State*, 1 *Harr. & Johns.* 340. *Martin vs. The State, Ibid* 721. *Wood vs. Lide*, 4 *Crunch*, 180.

The State
 vs
 Buchanan

On the *third point*—Whether the matters charged in the indictment amounted to an offence which could be prosecuted as a crime? they contended, that conspiracy was an offence at common law; that the statute *de conspiratoribus*, passed in the 33d year of the reign of *Edward I.* did not introduce a new rule, but was merely in affirmance of the common law; that the *gravamen* of the offence consisted in the unlawful combination or confederacy to injure a third person, and not in the actual execution of that unlawful or wrongful purpose. In support of their argument they cited 1 *Hawk. P. C. ch. 72, s. 2, p. 189.* 3 *Chitty's C. L.* 1139. *Staunf. P. C.* 173, 174. 1 *Burn's Just.* 389. 2 *Jacob's L. D. tit. Conspiracy*, 30. *Termes de Ley, tit. Covin.* *Plow.* 46, 54. *Co. Litt.* 357. *The King vs. Edwards* and others, 8 *Mod.* 320. 1 *Stra.* 707, S. C. cited in 1 *East's C. L.* 462. 4 *Blk. Com.* 137, (*Christian's Note.*) 3 *Wils. Lect.* 118. 2 *Reeves Hist. C. L.* 239, 240, 275, 357. 3 *Reeves*, 132. *Cowel's Inst.* 215, 282. 1 *Inst.* 143. 2 *Inst.* 283, 383, 384, 561, 562. *Smith Crashaw, Sir W. Jones*, 93. 3 *Inst.* 143. *Book of Assizes*, 138, pl. 44, art. 5, 6, 19; 102, pl. 77; 131, pl. 62; 134, pl. 12; 137, pl. 33, 34; 141, pl. 59; 144, pl. 72, 73, 74; 146, pl. 12; 166, pl. 43, 49; 177, pl. 21; 238, pl. 12, 19. *Britton, tit. Larcen*, 24. *Fitz. N. B.* 114, 134, 135, 216. 2 *Coke Litt.* 264, 265. *Latch*, 202. 2 *Roll. Ab.* 77, 78. *Rex vs. Breerton & Townsend*, *Noy's Rep.* 103, cited in 2 *East's C. L.* 823. *Lord Gray's Case*, *Moore* 788. *Scrog's vs. Peck & Gray, Ibid* 562. *The Poulterer's Case, Ibid* 814. 9 *Coke*, 56, S. C. 1 *Hawk. P. C.* 348, 349. *Timberly & Childe*, 1 *Siderfin*, 68. 1 *Lev.* 62, S. C. *Childe vs. North & Timberly*, 1 *Keble*, 203. *The King vs. Timberly, Ibid* 254, 675. *The King vs. Skirrett* and others, 1 *Siderfin*, 312, cited

DEC. 1821. in 2 *East's C. L.* 823. *The King vs. Armstrong* and others, 1 *Vent.* 304. *The King vs. Parris* and others, 1 *Sid.* 431. 1 *Vent.* 49, S. C. cited in 2 *East's C. L.* 823. *The Queen vs. Best* and others, 6 *Mod.* 185. 1 *Salk.* 174, S. C. 2 *Ld. Raym.* 1167, S. C. *Holt*, 151, S. C. *The King vs. Comings* and others, 5 *Mod.* 180. *The Queen vs. Orbell*, 6 *Mod.* 42, cited in 2 *East's C. L.* 823. *The Queen vs. Macarty* and others, 6 *Mod.* 302. 2 *Ld. Raym.* 1179, S. C. 3 *Ld. Raym.* 487, S. C. cited in 2 *East's C. L.* 823. *The Queen vs. Daniel*, 6 *Mod.* 99. 2 *Ld. Raym.* 1116, S. C. *The Queen vs. Glanvil*, *Holt Rep.* 354. *The Queen vs. Parry* and others, 2 *Ld. Raym.* 865. *The King vs. Venables*, 8 *Mod.* 378. *The King vs. O'Brian*, 13 *Vin. Ab.* 460, cited in 2 *East's C. L.* 825. *The King vs. Grimes & Thompson*, 3 *Mod.* 220. *The King vs. The Journeyman Tailors*, 8 & 9 *Mod.* 11. *The King vs. Starling*, (The *Tubwomen's* case,) 1 *Sid.* 174. 1 *Lev.* 125, S. C. 1 *Keble*, 650, 655, 672, 682, S. C. *Seele's* and others case, *Cro. Car.* 557. *The Queen vs. Blacket & Robinson*, 7 *Mod.* 39. *The King vs. Hispal*, 3 *Burr.* 1320. 1 *W. Blk. Rep.* 368, S. C. *The King vs. Parsons*, 1 *W. Blk. Rep.* 392. *The King vs. Benfield & Saunders*, 2 *Burr.* 980. *The King vs. March*, *Ibid* 999. *The King vs. Spragge* and others, *Ibid* 993. *The King vs. Wheatly*, *Ibid* 1127. 1 *W. Blk. Rep.* 275, S. C. *The Queen vs. Bryan*, 2 *Str.* 866, cited in 2 *East's C. L.* 825. *The King vs. Govers*, *Sayer's Rep.* 206. *The King vs. Cope* and others, 1 *Str.* 144. *The King vs. Kinnersley & Moore*, *Ibid* 193. *The King vs. Ward*, 2 *Str.* 747, cited in 2 *East's C. L.* 825. *The King vs. Lord Grey* and others, 3 *State Trials*, 519, cited in 1 *East's C. L.* 460. *The King vs. Delaval*, 3 *Burr.* 1434, 1439. 1 *W. Blk. Rep.* 410, 439, S. C. *The King vs. Bower*, *Cowp.* 323. *The King vs. Croke*, *Ibid* 28. *The King vs. Robinson & Taylor*, 1 *Leach. C. L.* 38, 44. 2 *East's C. L.* 1010. *Waites's* case, 1 *Leach*, 33. 2 *East's C. L.* 570. *Bazeley's* case, 2 *Leach*, 973. 2 *East's C. L.* 571. *Eccles* case, 1 *Leach*, 276. *Macklin's* case, 2 *Chitty, C. L.* 495. *Hevey's* case, 2 *East's C. L.* 856, 1010. 1 *Leach*, 268. 2 *Leach*, 790. 2 *East's C. L.* 823, 832, 837, 853, 862, 863, 973, 1004. *Vertue vs. Ld. Clive*, 4 *Burr.* 2472. *The King vs. Wilkes*, *Ibid* 2549. *The King vs. Mason*, 2 *T. R.* 581. *The King vs. Mawbey* and others, 6 *T. R.* 628, 636. *The King vs. Lara*, *Ibid* 565. *Clifford vs. Brandon*, 2 *Campb.* 358, 372, (note.) *The King vs. Philips*, 6 *East's Rep.* 466.

DEC. 1821.

The State
vs
Buchanan

The King vs. De Berenger, 3 Maule & Selw. 68. *The King vs. Gill & Henry*, 2 Barnw. & Alder. 204. *The King vs. Turner and others*, 13 East's Rep. 228. *Tomlin's case*, Godbolt, 444. *Nelson's Just.* 171. *Rex vs. Turner and others*, 1 Tremaine, 83. *Rex vs. Crisp and others*, Ibid 84. *Rex vs. Record and others*, Ibid 86. *Rex vs. Wilcox*, Ibid 91. *Rex vs. Taydler and others*, Ibid 96. *Rex vs. Alebone and others*, Ibid 97. *Rex vs. Montague*, Ibid 209. 4 Went. Plead. 79 to 113. Crown C. C. tit. Deceit. Ibid. tit. Conspiracy. 3 Chitty's C. L. 1145, to 1193. *The Commonwealth vs. Ward and others*, 1 Mass. Rep. 473. *The same vs. Judd and others*, 2 Mass. Rep. 329. *The same vs. Tibbert sr. & jr.* Ibid 536. *The Journeymen Cordwainer's cases in New-York, Philadelphia & Baltimore.* They also contended that our ancestors, when they settled the colony, brought the common law with them as part of their birth right, and that the law of conspiracy, being a part of the common law, was in as full force here as in *England*, and that the decisions of the *English* courts since, as well as before the revolution, were evidence of what the law of conspiracy is in this state—and that, according to those decisions, there could be no doubt but that all confederacies and agreements to injure third persons in their persons, their property, or their character, were indictable conspiracies in this state. They referred to *Calvin's case*, 7 Coke 1. 1 Blk. Com. 107. *Griffith vs. Griffith*, 4 Harr. & M Hen. 101. *Coomes vs. Clements*, in this court June term, 1819. 5 Com. Dig. tit. Navigation, (G 1.) 4 Com. Dig. tit. Lais. *Blanket vs. Gordon*, 2 P. Wms. 74, 75. *Jackson vs. Gilchrist*, 15 Johns. Rep. 103, 140. Sir John Randolph's opinion in *Smith's Hist. N. Y. Charter of Maryland*, sect. 10. 5 Jacob's L. D. tit. Planitation. The act of 1649, ch. 4. Decl. of Rights, sect. 3.

On the fourth point, whether this case was cognizable by the courts of this state? they cited *The Const. U. S.* art. 3, s. 2. Amend. 9, 10. *The Federalist*, 2 vol. 227, 230, 234. Ibid 3 vol. 264. 5 vol. L. U. S. 262, 268. *The United States vs. Worrell*, 2 Dall. Rep. 394. *The Commonwealth vs. Shaver*, 4 Dall. Rep. 28. *The United States vs. Hudson & Goodwin*, 7 Cranch, 32. *The United States vs. Cooledge*, 1 Wheat. 415. *Martin vs. Hunter's Lessee*, Ibid 323. *Sturgis vs. Crowningshield*, 4 Wheat. 122, 193, 195, 196, 199. *McCulloh vs. Maryland*, Ibid 410. *Livingston vs. Van Ingen*, 9 Johns. Rep. 574. *Houston vs. Moore*, 5 Wheat. 33, 34, 49. *Cohens vs. Virginia*, 6 Wheat. 399.

DEC. 1821. *Pinkney, Winder and Raymond*, for the defendants in error, contended, 1. That the state could not have a writ of error in a criminal case; that no authority for such a proceeding had been or could be shown. 2. That if the state could bring a writ of error in a criminal case, the record returned with the writ had not been certified in the manner directed by law for certifying a record in a criminal case. 3. That if the writ of error was rightfully brought, and the record legally certified, still there was no error in the judgment of the court below. (Authorities *supra*.) That the statute 33 *Edw. I.* was the origin of the law of conspiracy, and that statute did not include conspiracies to cheat. That cheating itself, with one or two exceptions, such as cheating with false weights, false measures, false dice, &c. was not an offence punishable at common law; and it would therefore be an absurdity to punish an agreement to cheat. *Wait's & Bazeley's* cases, 2 *East's C. L.* 571, 573. *Lara's* case, 6 *T. R.* 565. *Wheatley's* case 2 *Burr.* 1127. That if cheating was no offence, surely an agreement to cheat could be no offence. That the authorities relied on by the counsel for the state were most of them cases of conspiracy to do acts which were indictable. That the few cases of a different character were of doubtful authority, and ought not to be held sufficient to establish an absurd principle of law. They also contended, that if our ancestors brought with them the common law of *England*, or any part of it, it was that common law which had been established by judicial precedents at the time of their emigration, and not that which had since been expanded in *England* by judicial decisions. That a conspiracy must be to do some act in itself indictable. 3 *Inst.* 143. 9 *Coke*, 56. 4 *Blk. Com.* 137. *The King vs. Edwards* and others, 1 *Str.* 707. *The King vs. Turner* and others, 13 *East's Rep.* 238. 4. That admitting a naked agreement to be an indictable offence in this state, still it must be an agreement to cheat some person or being, known to the laws of the state; but that the Bank of the *United States* was a being created by a foreign government, and was wholly unknown to the laws of this state. That an agreement to cheat the Bank of the *United States* could no more be an offence against the laws of this state, than an agreement to cheat the Bank of *England* would be. That if the matters therefore charged in the

The State
vs.
Buchanan

indictment be an offence punishable as a crime, the courts of this state have no jurisdiction in this case—the same, if at all, being cognizable in the courts of the *United States*. They referred to the *Const. of U. S. art. 3, s. 1, 2*. The act of congress, 1789, *ch. 20, s. 9, 11*. *Martin vs. Hunter's Lessee*, 1 *Wheat.* 304, 323, 352. *Robinson vs. Campbell*, 3 *Wheat.* 212, 221. *Houston vs. Moore*, 5 *Wheat.* 1, 22, 24, 68, 72, 74.

DEC. 1821.

The State
vs
Buchanan

BUCHANAN, J. delivered the opinion of the court. This case was brought up by a writ of error directed to the judges of *Harford* county court; and it has been strongly urged, that a writ of error will not lie at the instance of the state, in a criminal prosecution, and therefore that the writ in this case was improvidently sued out, and ought to be quashed. But it is said in 2 *Hale's P. C.* 247, the authority of which it is difficult to question, and indeed we require none higher, "that if A be indicted of murder, or other felony, and plead *non cul*, and a special verdict found, and the court do erroneously adjudge it to be no felony; yet so long as that judgment stands unreversed by writ of error, if the prisoner be indicted *de novo*, he may plead *autrefois acquit*, and shall be discharged; but if the judgment be reversed, the party may be indicted *de novo*." And this is not a loose *dictum*, but it is laid down and repeated as text law; for in page 248 it is stated, that "in the case of the special verdict above, where an erroneous judgment of acquittal is given, yet it is conclusive to the King till it be reversed by error." So in page 394, speaking of the ancient form of a judgment of acquittal, he says "and if the entry were such, I do not think the prisoner could ever be arraigned again, notwithstanding the insufficiency of the indictment, till that judgment of acquittal were reversed." And again in page 395 of the same book, "and if in *Vaux's* case the judgment had been so entered (that is, *quod eat inde queritus*,) he could never again have been indicted for the same offence, notwithstanding the defect of the indictment, till that judgment reversed by writ of error." Hence it is manifest that, in the opinion of Lord *Hale*, the King might have a writ of error in a criminal case; since it would be absurd to say that a man who had obtained a judgment of acquittal for a defect in the indictment, or on a special verdict, could never again be indicted for the same offence,

DEC. 1821. until that judgment was reversed by writ of error, if a writ of error would not lie. Fortified by such authority alone, in the absence of any legislative provision in this state on the subject, we think we might safely say, without further inquiry, that the writ of error in this case was properly sued out. But instances are not wanting of writs of error being prosecuted by this state, in criminal cases; as in *The State vs. Messersmith & Askew*, *The State vs. Forney*, *The State vs. Brown*, and *The State vs. Durham*, in the court of oyer and terminer &c. for Baltimore county. In each of those cases there was a demurrer to the indictment, and judgment on the demurrer for the defendant, in the court below. They were all taken to the late general court on writs of error by the state, *Luther Martin*, attorney general; and in each case the judgment was reversed. And there is no sufficient reason why the state should not be entitled to a writ of error in a criminal case. It is perhaps a right that should be seldom exercised, and never for the purpose of oppression, or without necessity; which can rarely, and it is supposed would never happen, and would not be tolerated by public feeling. But as the state has no interest in the punishment of an offender, except for the purpose of general justice connected with the public welfare, no such abuse is to be apprehended; and as the power of revision is calculated to produce a uniformity of decision, it is right and proper that the writ should lie for the state, in the same proportion as it is essential to the due administration of justice; that the criminal law of the land should be certain and known, as well for the government of courts and information to the people, as for a guide to juries; who though (by the laws and practice of the state) they have a right to judge both of the law and of the fact, in criminal prosecutions, should, and usually do, respect the opinions and advice of judges, on questions of law, and would seldom be found to put themselves in opposition to the decisions of the supreme judicial tribunal of the state.

It has also been contended, that the return of the writ of error in this case, supposing the writ to have been properly sued out, is defective in this, that it is not under the hand and seal of the chief judge, but that there is only a transcript of the record sent up, under the hand of the clerk and the seal of the court, with the writ of error an-

The State
v.
Buchanan

nexed. But there is nothing in the objection. By the *fifth* section of the act of 1713, *ch. 4*, "for regulating writs of error, and granting appeals from and to the courts of common law within this province," it is enacted, "that the method and rule of the prosecution of appeals and writs of error, shall for the future be in manner and form as is hereinafter mentioned and expressed; that is to say, the party appealing or suing out such writ of error as aforesaid, shall procure a transcript of the full proceedings of the said court, from which such appeals shall be made, or against whose judgment the writ of error shall be brought as aforesaid, under the hand of the clerk of the said court and seal thereof, and shall cause the same to be transmitted to the court before whom such appeal or writ of error is or ought to be heard, tried and determined," &c. The preamble sets out that "forasmuch as the liberty of appeals and writs of error, from the judgment of the provincial and county courts of this province, is found to be of great use and benefit to the good of the people thereof;" and the *second* section provides under what circumstances alone, an appeal or writ of error shall operate as a *supersedeas*. The act is silent on the subject of the *return* of the writ of error, and only directs that the transcript of the proceedings shall be under the hand of the clerk and seal of the court, without dispensing with the signature of the judge to the return of the writ; yet from that time to the present, the uniform practice under that act has been, for the clerk to send up the transcript of the proceedings under his hand only, and the seal of the court, together with the writ of error, as is done in this case, unaccompanied by the signature of the judge to the return of the writ. And if it should be admitted that it originated in error, it is now too late to shake a practice so long settled. It may perhaps be doubted whether that act of the general assembly ought not to be understood as being applicable to writs of error in civil causes only; and it has been urged, that no practice growing out of it in relation to such cases, can be brought in aid of a defective return in a criminal case. But whatever may have been the construction originally given to it in that particular, whether it was held to extend as well to criminal as to civil cases, or whether the returning of writs of error in the same manner in criminal as in civil cases, had its birth in the circumstance, that the mandate of the writ

DEC. 1821.

The State
vs
Buchanan

DEC. 1821.

The State
vs
Duchman

being the same in each, no good reason could be perceived why the manner of the return should be different; or from whatever other cause it may have arisen, the practice is found on examination to have been the same. That was the form of the return in the cases of *The State vs. Messersmith & Askew*,—*The State vs. Forney*,—*The State vs. Brown*,—and *The State vs. Durham*; the cases before alluded to for a different purpose. The same return was made in *Burk's* case, an indictment for a Rape, which was tried before me in *Washington* county court in the year 1809, and was brought up by writ of error to this court, by the present attorney general, (*Luther Martin*,) who defended him with great zeal and ability in the court below, and it is presumed looked well into the subject. And so in every criminal case removed by writ of error, that is to be found among the records of the late general court, of which there are many. The return therefore in this case has the sanction of the same authority on which a similar return in a civil case would rest—the authority of a settled practice for more than an hundred years, with which we are content without seeking to support it on any other; nor is it pretended that such a return would be insufficient in a civil case; and there is no sensible difference between a criminal and a civil case in that respect, or any sound reason why the return should not be the same in one as in the other. But there is no uniform rule for the return of writs of error; and if the object of the writ, which is that a true and perfect transcript of the proceedings shall be brought up, is substantially gratified, it is all that courts do or need look to. If a writ of error be brought in parliament on a judgment in the court of King's Bench, the chief justice goes in person to the House of Lords, with the record itself, and a transcript, which is examined and left there, and then the record is brought back again into the King's Bench. 2 *Tidd's Practice*, 1092. In the court of common pleas the practice is different. There on a writ of error returnable in the King's Bench, it is usual for the chief justice to sign the return. *Ibid*, (note.) But that is not absolutely necessary, for the court of King's Bench will not stay the proceedings for want of his signature; and tho' the writ of error requires the record to be sent *sub sigillo*, yet this is never practised. *Blackwood vs. The South Sea Company*, 2 *Strange*, 1063. And if the seal can be

dispensed with, why may not the signature also? since the omission of either, is equally a departure from the mandate of the writ, and both are dispensed with in the case of a writ of error returnable from the King's Bench to the House of Lords. Besides, in *England*, a writ of error must be directed to him, who has the custody of the record wherein any judgment is given; and for that reason it is, that a writ of error brought on a judgment in the court of common pleas, for instance, is always directed to the chief justice of that court, who has the custody of the record. But in this state, tho' the form of the writ as used in *England*, and introduced here at a very early period, is still retained, yet the clerk of the court in which the judgment is rendered, has a much greater control over the record than in *England*, and hence probably arose the practice, that appears to have prevailed here at least from the year 1713, for the clerk to send up a full transcript of the proceedings under his hand only, and the seal of the court, with the writ of error annexed, which sufficiently gratifies the object of the writ; as much so as the practice in the Court of King's Bench on a writ of error brought in parliament; and affords as much certainty of a full and perfect transcript of the proceedings, as a return of the writ under the signature of the chief justice—the course usually pursued in the Court of Common Pleas, in relation to writs of error returnable in the King's Bench.

These preliminary questions being thus disposed of, the next presented for consideration, is whether the facts stated in the indictment, amount to an offence punishable by the laws of *Maryland*. This is denied on the part of the defendants in error, and much reliance is placed on the statute 33 *Edward I. de conspiratoribus*, on the supposition that the offence of conspiracy, was originally created by that statute; or if it was a common law offence, that the statute either contained a definition of all the conspiracies that were before indictable at common law, or annulled the common law, and rendered dispensable all conspiracies but such as it defines. And if either position be correct there is an end to this prosecution, since the matter charged in the indictment is clearly not embraced by the statute; and if it was, the statute being considered as not in force here, the case would not be helped; and there would be no law in this state, for the punishment of conspiracies

DEC. 1821.

The State
vs
Buchanan

DEC. 1821.

The State
vs
Buchanan

of any description, there being no legislative provision on the subject. But neither branch of the proposition, will on examination be found to be true. The statute is in these words: "Conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indite, or cause to indite, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees to maintain their malicious enterprises; and this extendeth as well to the takers, as to the givers. And stewards and bailiffs of great lords, which by their seignory, office, or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estate of their lords or themselves."

Without looking beyond the statute itself, there may be found sufficient evidence on the face of it, to show that conspiracies were known to the law before. "Conspirators be they," &c. Now why should they have been declared to be conspirators, who should confederate for any of the purposes mentioned in the statute, if they were not liable to punishment for such combinations? And if they were, it was for the conspiracy that they were so liable to be punished; as without the offence of conspiracy, there could have been no punishable conspirators. The statute does not prohibit conspiracies or combinations of any kind, it does not declare combinations or conspiracies of any description to be unlawful, nor does it impose a penalty, or inflict any punishment upon conspirators. And if combinations for any of the purposes mentioned in the statute, were punishable at all, it could only have been on the ground, that both the offence of conspiracy (*eo nomine*), and the punishment, were known to the law anterior to the enactment of the statute; and that the declaring those to be conspirators, who should be engaged in certain combinations, subjected them to the law of conspiracy as it then existed. And it has never been pretended, that the combinations enumerated in the statute were not indictable conspiracies. The statute, therefore, which had for its object the prevention of the combinations it enumerates, carries with it internal evidence, that conspiracy was an indictable offence before. But the question, whether conspiracies were indictable or not at common law, anterior to the statute 33 Edward I.

DEC. 1821.

The State
vs
Buchanan

does not depend alone upon the construction of that statute. In 3 *Coke's Institutes* 143, and 1 *Hawk. P. C.* 193, *ch.* 72, *sec.* 9, it is said, that the *villinous* judgment is given by the common law, and not by any statute, against those convicted of a conspiracy. Now this judgment, called the villinous judgment, which was known only to the common law, could never have been given, unless conspiracy was an offence punishable at common law. In the 20th year of the reign of *Edward I.*, a civil remedy was provided against conspirators, &c. by the writ of conspiracy; and the statute 23 *Edward I.*, *ch.* 10, entitled, "The remedy against conspirators, false informers and embracers of juries," makes this further provision: "In right of conspirators, false informers, and evil procurers of dozens, assises and juries, the king hath provided remedy for the plaintiffs by writ out of the chancery; notwithstanding, he willeth that his justices of the one bench and of the other, and justices assigned to take assises, when they come into the country to do their office, shall upon every plaint made unto them, award inquests thereupon without writ, and shall do right unto the plaintiffs without delay." It must be the provision in the 20th of *Edward I.*, for the writ of conspiracy, to which the first clause of this statute has reference, as there does not appear to be any other, and which according to 2 *Institutes* 562, was but in affirmance of the common law; and these provisions for private remedies against conspirators, clearly demonstrate the existence of the offence of conspiracy. It is equally clear, that the statute does not embrace all the ground covered by the common law. Who doubts, or was it ever questioned, that a conspiracy to commit any felony is an indictable offence; as to rob or murder, to commit a rape, burglary or arson, &c. or a misdemeanor, as to cheat by false public tokens, &c? Indeed this has been conceded throughout the whole of the argument in this case, and the ground mainly relied upon, on the part of the defendants in error is, that the object of the conspiracy charged in the indictment, is not of itself an indictable offence. Yet such cases of conspiracy are not made punishable by any statute, and are only indictable at common law; which could not be, if the statute 33 *Edward I.*, either furnished a definition of all the conspiracies indictable at common law, or restricted and abridged the latter, by rendering dispunishable, all

DEC. 1821. such as it does not define. This statute is not prohibito-

The State
vs
Buchanan

ry, nor is the existence of other punishable conspiracies, than those which it enumerates, at all repugnant to, or inconsistent with any of its provisions; and according to any known rule of construction, the common law of conspiracy such as it was before, may well stand together with the statute; for surely the merely declaring one act to be an offence, which act as well as others, was so before in contemplation of law, cannot render those others dispensable: nor will one act, which in law amounts to a particular offence, cease to be so, because another act is merely declared by statute (without any negative words) to amount to the same offence. The statute, therefore, must be considered either as declaratory of the common law only, so far as it goes, for the purpose of removing doubts and difficulties which may have existed in relation to the conspiracies it enumerates, by giving to them a particular and definite description; or as superadding them to other classes of conspiracy already known to the law, leaving the common law in possession of all the ground it occupied beyond the provisions of the statute. And so it has been uniformly understood in *England*, from the earliest down to the latest decision that is to be found on the subject; otherwise the judges could not have sustained a great proportion of the prosecutions for conspiracy, with which the books are crowded; in some of which, the objection, that the matter charged was not within the statute 33 *Edward I.*, was made and overruled, as will be hereafter shown. In the *Book of Assises*, 27 *Edward III.*, ch. 44, it is said, that "inquiry shall be made concerning conspirators and confederates, who bind themselves by oath, covenant or other agreement, that each will support the enterprizes of the other, whether true or false;" and in the same book we find this notice of a criminal prosecution: "and note that two were indicted for a confederacy, each of them to maintain the other, whether the matter was true or false; and notwithstanding, that nothing was alleged to have been actually done, the parties were put to answer, because it was a thing forbidden by law." If this falls within either of the provisions of the statute 33 *Edward I.*, it can only be that, which relates to the moving and maintaining pleas; and that does not embrace it; for if the indictment had been under the statute, for a confederacy "falsely to move

DEC. 1821.

The State
vs
Buchanan

and maintain pleas," which can only have reference to proceedings in courts of justice, it is very clear that the parties must have been acquitted, as the conspiracy was not to do that specific act, otherwise they might have been punished for what they did not contemplate, since nothing being alleged to have been done, *non constat*, that they had any intention to move and maintain pleas within the purview of the statute; and the intention enters into the essence of every offence. The indictment, however, was not under the statute, for either of the specific acts mentioned in it, but at common law for the conspiracy, which was considered *per se* a substantive offence, no act in furtherance of it being alleged, and this after, and notwithstanding the statute. The position, that "a confederacy each to maintain the other, whether the matter be true or false," is a common law offence, is distinctly adopted in 1 *Hawk. P. C.* 190, *ch.* 72, and 9 *Coke's Rep.* (the *Poulterer's* case) 56; and the principle of the case noted in the *Book of Assises*, to wit, that conspiracies are punishable at common law, though nothing be put in execution, is fully recognized in the *Poulterer's* case, in which that book is referred to; and this further principle also laid down, that the law punishes the conspiracy, "to the end to prevent the unlawful act;" and in the same case, speaking of another, article 19, also in the *Book of Assises*, 138, relative to combinations among merchants to regulate the price of wool, it is said, "and in these cases, the conspiracy or confederacy (not the false conspiracy or confederacy) is punishable, although the conspiracy or confederacy be not executed." Hence it is manifest, that the "*nota*" at the end of the case, which seems to be relied on to show, that both malice and falsehood are indispensable ingredients of a punishable conspiracy, and must be united in the same case, was not intended by Lord Coke as applicable to all confederacies, but to such false conspiracies only, as are of the character of those, of which he had treated immediately preceding the *nota*; for he does not speak of the case of a conspiracy between merchants to fix the price of wool, as a false conspiracy, nor does either falsehood or malice, necessarily enter into such a combination. And these combinations among merchants, (which are not within the statute 33 *Edward I.*) were, and remained punishable at common law, and were not first

DEC. 1821.

The State
vs
Buchanan

made so by the statute staple, 27 *Edward III. ch. 9*, as has been supposed in argument. That statute does indeed prohibit the exportation of wool under a very severe penalty, but neither creates, nor provides a punishment for, the offence by merchants, of combining to fix a price beyond which they would not go. All that is said in relation to the purchasing of that article is, that "all merchants, as well subjects as foreigners, may purchase wool-folk, &c. throughout the whole of our kingdom and territories, without covin or collusion to lower the price of the said merchandizes, so nevertheless as they bring them to the staple;" from which it would seem that all covin and collusion to lower the price of merchandize was before unlawful, and that the statute meant to leave the law as it was. In the *Poulterer's* case, it was clearly considered as an offence at common law; and in 4 *Blk. Com.* 154, the exportation of wool, which, as has been before observed, was prohibited by the statute staple, under a very heavy penalty, is said to have been forbidden at common law, but more particularly by that statute; and if that, which it was the principal object of the statute to prevent and to punish, was before, an offence at common law, it may readily be supposed, that *no* new offence was intended to be created; but that a conspiracy to fix the price of wool, was an offence at common law. Moreover, the words of the statute are "without covin or collusion to lower the price," &c. and a combination to "fix a price, beyond which they would not go," might not necessarily be to "lower" the price. On an information against *Breerton, Townsend* and others, *Noy's Rep.* 103, for the suppression of a will, to the prejudice of *Egerton*, the relator, whose wife was thereby disinherited, all the defendants but one were convicted and fined. This was a case of fraud effected by a confederacy, and the injury was to an individual; the suppression of a will by one was not an indictable offence, though a fraud highly injurious to the party affected by it. It was the confederacy alone which rendered it criminal, and therefore, the information was against the offenders conjointly. In *Timberly and Childe, Siderfin* 68, the indictment was for a conspiracy to charge one with being the father of a bastard child, with intent to extort money from him; and on motion to quash the indictment, it was held by the court to be good. In *Child vs. North and Timber*

ly, 1 *Keble* 203, the indictment was for a conspiracy to deprive the prosecutor of his fame, and to extort money from him, by falsely charging him with being the father of a bastard child. There was a motion to quash the indictment, because the conspiracy as laid, was to charge the prosecutor with matter that the court had no cognizance of; which was overruled, on the ground that it *might* be a loss to the prosecutor; and it was held that the conspiracy was punishable, though the court had no cognizance of the matter of it. And in the same case in 1 *Keble* 254, it was moved after verdict in arrest of judgment, that the indictment only charged the parties with a conspiracy to deprive the prosecutor of his fame, and to extort money from him, and not with a conspiracy to charge him before any tribunal having cognizance of the matter of bastardy. But the motion was overruled, and judgment rendered for the king, on the *two* grounds distinctly taken, that it was a conspiracy for lucre and gain, to charge and disgrace a man with having a bastard, and that the *crime* was the conspiracy, which whether it was to defame or disgrace a man, or to charge him with heresy, was punishable at common law. In *The Queen vs. Armstrong, Harrison* and others, 1 *Ventr's* 304, the defendants were indicted for conspiring to charge (or burden) one with the keeping of a bastard child, and thereby to bring him to disgrace. After verdict there was a motion in arrest of judgment, on the ground that it did not appear that the party was actually burdened with the keeping of a child; but on the contrary that it was alleged to be only a pretended child; and also, that the party was not stated to have been brought before a justice of the peace on that account; but only that the defendants went and affirmed it to himself, intending to obtain money from him, that it might be no further disclosed; and that a bare unexecuted conspiracy was not a subject of indictment. The objection was overruled and the parties were punished by fine. The principle of this case cannot well be misunderstood. It was a conspiracy to extort money from an individual, by going to him, and affirming that he was the father of a bastard child, with a view of inducing him to pay them to say no more about it. And it was decided on the ground (expressly taken by the court) that it was a contrivance by *conspiracy*, to defame the person, and *cheat* him of his money,

DEC. 1821.

The State
vs
Buchanan

DEC. 1821. which was an indictable crime of a very heinous nature. In *The Queen vs. Best* and others, 2 *Ld. Raym.* 1167, the indictment was for a conspiracy, falsely to charge the prosecutor with being the father of a bastard child, with which one *Elizabeth Carter* was pretended to be ensient, in order to defraud him of his money, and destroy his reputation. On demurrer it was among other things objected to the indictment, that it was not alleged that the child was likely to become chargeable to the parish, and that it did not appear, that the prosecutor was by the accusation put in danger of being subjected to any penalty; but that it amounted only to a charge, that the defendants conspired to tell the prosecutor that he was the father of the child the woman was big with, and that a bare conspiracy to do an ill act, was not indictable. But the demurrer was overruled, on the principle broadly laid down by the court, that the defendants being charged at least with a conspiracy, to charge the prosecutor with fornication, though that was only a spiritual defamation, yet the conspiracy was the gist of the indictment, and was a temporal offence, and punishable as such. *The King vs. Kinnersly & Moore*, 1 *Strange* 193, was a case of conspiracy to extort money from Lord *Sunderland*, by charging him with an attempt to commit sodomy with one of the defendants. It was not charged as a conspiracy to accuse him in a course of justice, but only *in pais*. The object was to extort money, by means of a verbal slander, for which the party injured had his civil remedy, and the mere verbal slander by one only, would not have been indictable. And in *The King vs. Martham Bryan*, 2 *Strange*, 866, the court in speaking with reference to *The King vs. Armstrong & Harrison*, say, "there the conspiracy was the crime; and an indictment will lie for that, though it be to do a lawful act." In this class of conspiracies, the meditated end was not accomplished in either of the cases. The object in each was to defame and extort money from an individual; and the indirect or wrongful means, by which that object was intended to be effected, was verbal slander—a combination to do that, which if actually done by one alone, would not be the subject of an indictment; for if one verbally defames another, or extorts money from him, not under colour of office, it is not an indictable offence. The conspiracy therefore for a corrupt purpose, was the offence for which they

The State
vs
Buchanan

DEC. 1821.

The State
vs
Buchanan

were punished; and there is no pretence for supposing, as has been urged in argument, that the prosecutions in the bastardy cases were sustained on the ground, that the conspirators contemplated an abuse of judicial authority, by falsely accusing, or causing the parties to be accused, of having bastard children, before justices of the peace having cognizance of such matters. A conspiracy of that character, would there is no doubt have been an indictable offence, having for its object, the subjecting the party accused, to the provisions of the statutes in relation to bastardy. But that is not the nature of the conspiracy charged in either of the cases referred to. In every case the defendants were indicted for a conspiracy to defame and extort money from the prosecutor, by charging him with being the father of a bastard child, not before justices of the peace, but the charge is laid as having been made *in pais*; and in *The King vs. Timberly & North*, one of the objections to the indictment was, that it did not lay the conspiracy to be, to charge the prosecutor before any that had jurisdiction of the matter; and in *The Queen vs. Armstrong, Harrison*, and others, the same objection was raised, and also, that the defendants only went and affirmed it to the prosecutor himself; and so in *The Queen vs. Best*, and others, which with the exception also taken in *The King vs. Timberly & North*, that it was not within the statute 33 *Edward I.* was disregarded by the judges. "Every indictment must contain a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation, lest the grand jury should find a bill for one offence, and the party be put upon his trial for another, without any authority." 1 *Chitty's Criminal Law*, 169. And "the charge must be sufficiently explicit to explain itself, for no latitude of intention can be allowed, to include any thing more than is expressed."—*Ibid* 172. *The King vs. Wheatly*, 2 *Burr*. 1127. And the accused is put upon his trial only for that, with which he is charged, and against which alone he is called on to defend himself. The prosecutions therefore in the cases referred to, could not have been supported on the ground, that the defendants contemplated an abuse of judicial power, by falsely accusing the prosecutors before justices of the peace; for no matter what they contemplated, that was not what they were charged with, and if they were

DEC. 1821. only punishable on that ground, as the judges could not by intendment, have supplied what was not expressed, the indictments must have been quashed, or the judgments arrested for want of sufficient matter in law, (which was brought fully under the consideration of the courts,) otherwise it would have been, to punish the defendants for what they were not convicted of, for they could only have been convicted of what was alleged against them in the indictments. And thus the singular picture would have been exhibited in criminal jurisprudence, of men *convicted* of what was no offence in law, and *punished* for what they were neither convicted nor accused of, and for any thing appearing might never have contemplated; but such a stain is not to be found on any page of juridical history. These remarks equally apply to the case of *The King vs. Kinnersly & Moore*; and it is not possible that in either of the cases, the judges went on the ground, that the defendants had accused, or meditated the accusation of the prosecutor before those who had jurisdiction of the matter; on the contrary the idea is expressly negatived by the proceedings themselves. The absence of the allegation was urged in each case, as an objection to the indictment, and the court decided, not that it might be inferred from what was alleged, but that it was not necessary, and that the conspiracy alone to defame and extort money from an individual, without any abuse, or meditated abuse of judicial power, was *per se* an indictable offence at common law. If they had not stated the grounds on which they acted, then indeed any legal principle that could be extracted from the cases, might, in support of the decisions, properly be assumed as the ground on which they were given. But the ground that is here attempted to be assumed, as that on which the conspirators were punishable, is not only different from that, on which the judges expressly place their decisions, but is an illegal ground, and one on which the indictments could not have been supported. Illegal, not because a conspiracy to accuse a man of being the father of a bastard child, or of an attempt to commit sodomy, before those who had cognizance of such matters, was not an indictable offence, but because it was, what was not charged in the indictments, and could not legally be *inferred* from what was expressed. To say therefore, that those conspiracies were indictable, or that the prosecutions were sustained

The State
vs
Buchanan

DEC. 1821.

The State
vs
Buchanan

only on the ground, that the conspirators meditated the abuse of judicial power, by falsely accusing the prosecutors before a tribunal having cognizance of such offences, would be to overturn altogether the authority of the cases, which has not been attempted; on the contrary their authority seems to be admitted, and their application only to the case under consideration is resisted, on the hypothesis, that they were decided on grounds not appearing in the indictments, and entirely different from those on which the judges professed to act. But the fallacy of the argument becomes obvious, when it is seen, that without a violation of the principle, that "every indictment must contain a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted," the indictments in those cases could not have been sustained upon the grounds on which the decisions are attempted to be placed. Those cases therefore must stand or fall on the grounds upon which they are placed by the judges who decided them, not the *reasoning* of the judges, but the *principles* on which their decisions are made to rest. *The King vs. Parsons*, and others, 1 *Blk. Rep.* 392, was a conspiracy to take away the character of an individual, and accuse him of murder, by means of a mere phantom, which could have no reality—pretended communications with a ghost; and the actual fact of conspiring, was left to the jury to be collected from all the circumstances. The only object of the conspiracy in that case, was to injure the man's reputation. And in *The King vs. Rispal*, 1 *Blk. Rep.* 368, 3 *Burr.* 1320, which was a prosecution for a conspiracy to extort money from an individual, by charging him generally with having taken a quantity of human hair out of a bag; on the objection being raised to the indictment, that the defendants were not charged with having conspired to fix any crime on the party, but only generally with taking the hair, which might be lawful, it was said by Lord *Mansfield*, the other judges concurring, "the crime laid, is an unlawful conspiracy; this, whether it be to charge a man with criminal acts, or such only as may *affect* his reputation, is fully sufficient." That case, if received as authority, settles this principle, that a conspiracy to defraud another by verbal scandal is equally indictable, whether it be to charge the party with a crime, or only to injure his standing in society, and is a full answer to the argument

DEC. 1821.

The State
vs
Buchanan

that the principle of the cases last referred to, is not applicable to this, because they are of conspiracies to fix punishable offences upon the parties. In *The King vs. Skirret*, and others, 1 *Siderfin* 312, the defendants were prosecuted for reading a release to an illiterate man, in other words than those in which it was written, by which he was induced to sign it. It does not appear by the short report of the case, what the form of the indictment was, but as it was against them conjointly, they must have been charged either with conspiracy or combination. The fraud was practised upon an individual, and if it had been perpetrated by one *only*, would not have been an indictable cheat. It was the combination therefore alone which made it criminal, and that too is a case not within the statute 33 *Edward I.* In *The Queen vs. Mackarty and Fordenbourgh*, 2 *Ld. Raym.* 1179; 2 *East's C. L.* 823, the defendants were conjointly indicted, for falsely and deceitfully bargaining and exchanging with another, a quantity of pretended wine, alleging it to be good new *Lisbon* wine, for a certain quantity of hats, which were exchanged and delivered by the party practised upon, on the faith of their false representations, when in fact the pretended *Lisbon* wine, was not *Lisbon* wine. The indictment in this case was not under the statute 33 *Henry VIII. ch. 1*, which prohibits cheating by "means of false privy tokens, and counterfeit letters in other men's names;" nor the statute 30 *Geo. II. ch. 24*; which provides, under heavy penalties, against cheating by "false pretences," (and which was passed long afterwards,) but was for a cheat at common law, and though it did not charge the defendants with a conspiracy *eo nomine*, yet it charged, that they together did the act imputed to them; and as there were no false public tokens, which were necessary at common law, to constitute a cheat effected by *one*, an indictable offence, it was the combination alone on which the prosecution could have been sustained. A cheat perpetrated by the use of false public tokens, such as false weights and measures, is an indictable crime at common law, only because they are means calculated to deceive, and are such, as common care and prudence are not sufficient to guard against; and so as ordinary care and prudence are no safeguard against the machinations of conspirators, cheats effected by conspiracy are punishable at common law, for "*pari ratione, eadem est lex.*"

And in *The King vs. Wheatly*, 2 Burr. 1127, cheats effected by conspiracy, are expressly placed on the same footing with cheats effected by false weights and measures. In *The Queen vs. Orbell*, 6 Mod. 42, the indictment was for a combination to cheat one J. S. of his money, by getting him to bet a certain sum on a foot race, and prevailing on the party to run booty; and the court sustained the indictment on the ground as they said, that "being a cheat, though it was private in the particular, yet it was public in its consequence." That was a case emphatically of individual injury, and as little connected with any public concernment, as any private transaction could well be, and it was the combination alone on which the prosecution rested; for such a cheat practised by one was clearly not an indictable offence. In *The King vs. Edwards* and others, 8 Mod. 320, the parties were indicted for giving money to a man, to marry a poor helpless woman who was an inhabitant of the parish of B, and incapable of marriage, on purpose to gain a settlement for her in the parish of A, where the man was settled. In that case there was a motion to quash the indictment, on the ground that it was not unlawful to marry a woman and give her a portion. But the object of the conspiracy, being to impose a pauper on a parish to which she did not belong, it was held by the court to be an indictable offence at common law; for that a bare conspiracy to do a *lawful* act to an *unlawful* end, was a crime, though no act should be done in consequence thereof. The conspirators certainly meditated a fraud on the *inhabitants* of a particular parish, by burdening them with the support of a pauper belonging to a different parish, and so far perhaps it may be viewed as a case of contemplated private fraud, as the inhabitants of a *parish* are not the community at large. But whether the principle laid down by the court, was on the point of meditated individual injury or violation of public police, does not appear from the report of the case. In *3 Chitty on Criminal Law*, it is treated as a conspiracy to violate public police; but the principle equally applies to both. In *The King vs. Cope* and others, 1 *Strange*, 144, the prosecution was for a conspiracy to ruin the trade of the prosecutor, who was a card-maker to the king, by bribing his apprentices to put grease into the paste, by which the cards were spoiled. The putting grease into the paste, and thereby spoiling the

DEC. 1821.

The State
vs
Buchanan

DEC. 1821.

The State
vs
Buchanan

cards, if done by *one*, would have been no crime in law, but a private injury, for which the party would have been left to his civil remedy; and it was the conspiracy alone which constituted the offence. And in *The King vs. Eccles*, 1 *Leach's Crown Cases*, 274, the indictment was for a conspiracy, by wrongful and indirect means, to impoverish one *Booth*, a tailor, and to deprive and hinder him from following and exercising his trade. In the first count in the indictment, the object of the conspirators was alleged to have been accomplished, and in the second count the conspiracy only, was charged. It was not denied that the conspiracy was an indictable offence, and the only objection on the part of the defendant was, that the *acts* done to impoverish *Booth*, ought to have been set out in the indictment. But it was decided by the whole court, that it was sufficient to allege the conspiracy and the object of it, the illegal combination being the gist of the offence; and that it was not necessary to state the means, by which the intended mischief was effected; for that the *offence* did not consist in doing the acts by which the end was accomplished, (for they might be perfectly indifferent,) but in the conspiring with a view to effect the intended mischief by any means; and by *Buller*, justice, that "the means were only matters of evidence to prove the charge, and not the crime itself." It has been contended that these last cases were conspiracies to injure public trade; the distinguished judges before whom they were tried have not said so, nor could they have so considered them. They were not so laid in the indictments, but were distinctly cases, in which the meditated injuries were levelled against particular individuals, unconnected with any matter of public concernment, and do not fall within the principles of any of the enumerated offences against public trade, which are offences committed by traders or dealers themselves, such as cheating, forestalling, regrating, &c. So in *The King vs. Leigh* and others, (*Macklin's case*,) 2 *Macklin's Life* 217, in which it was held, that an indictment would lie for a conspiracy to impoverish an actor, by driving or hissing him off the stage: and in *Clifford vs. Brandon*, 2 *Campb.* 358, it was said by Sir *James Mansfield*, that "though the audience had a right to express by applause or hisses their sensations at the moment, yet if a body of men were to go to the theatre,

with a settled intention, of hissing an actor, or even of damning a piece, there could be no doubt that such a *deliberate preconcerted scheme* would amount to a conspiracy, and that the persons concerned in it might be brought to punishment." There the *preconcerted scheme* alone, the *unexecuted conspiracy*, was held to be indictable; but if put into execution, according to circumstances, it would be a riot. In *The King vs. Robinson and Taylor*, 1 *Leach's Crown Cases*, 37, the defendants were indicted for a conspiracy to raise a specious title in *Mary Robinson* to the estate of *Richard Holland*, by marrying *Taylor*, under the assumed name of *Richard Holland*. The only evidence in the case was of the marriage, and that she lived with *Holland* as a kind of servant. It was distinctly admitted, that a conspiracy to do an injury to the person or estate of another was an indictable offence, and so held by the court, *Willes*, *Foster* and *Reynolds*, presiding; and it was also ruled, there being no positive proof of an intention to injure *Holland*, that it was not necessary to prove any direct or immediate injury, or even to show any specific overt act of conspiracy, but that it was the province of the jury to collect from all the circumstances of the case, whether there was not an intention or design in the parties to do a future injury to *Holland*. And that case would seem to cover all the ground necessary to support this prosecution. The conspiracy was levelled at the property or estate of another, and the object was to defraud an individual, but the act by which the fraud was intended to be accomplished, (a marriage under an assumed name) was not in itself unlawful. It has been ingeniously argued here, but not ventured on by those who conducted the defence of *Robinson* and *Taylor*, that they meditated a perversion of the course of justice, as her right to *Holland's* estate could only have been established by judicial proceedings. It was not so charged in the indictment, and without it, the prosecution must have failed, if it had been deemed at all necessary to constitute the offence; for "no latitude of intention can be allowed to include any thing more than is expressed in an indictment," as has been before observed on the authority of Lord *Mansfield*, in the case of *The King vs. Wheatly*, 2 *Burr.* 1127, and 1 *Chitty's Criminal Law*, 172. In *The King vs. Lara*, 6 *T. R.* 565, it was admitted by counsel in argument, that a fraud up-

DEC. 1821.

The State
vs
Buchanan

DEC. 1821. on an individual by conspiracy was indictable, and the doctrine laid down by the judges in *The King vs. Wheatly*, was fully recognized and adopted by Lord *Kenyon*; that is, that a cheat effected by a conspiracy, was an indictable offence. The case of *The King vs. Berenger, 3 Maule & Selwyn*, 68, as it is understood by the court, is a very strong one. The indictment was for a conspiracy by false rumours to raise the price of the public government funds, with intent to injure *such* of the King's subjects as should purchase on a particular day. It was broadly admitted in argument, that if the indictment had stated, "that the defendants conspired to raise the price of the funds in order to cheat or prejudice particular individuals by name, or to benefit themselves at their expense, or that the public were concerned in the purchases of that day, and the defendants conspired, &c. to the prejudice of the public, it would have exhibited a complete offence." But it was contended, that the allegation, that it was with intent to injure "such of the King's subjects as should purchase on that day," was too general, and for that reason only, the indictment was objected to. But the objection was overruled by the court, not on the ground, as supposed in argument, that to constitute an indictable conspiracy, it should be levelled either at the public in its aggregate capacity, or at a *class* or *portion* of the subjects, as distinguished from an individual, and that the case fell within one of those classes of conspiracies; for it was treated throughout as perfectly clear, that if it had been laid with intent to prejudice or defraud either the public, or an individual or individuals by name, it would have been good; and the only difficulty on that part of the case was, whether, being laid with intent to injure *those who* might become purchasers, and not either an individual by name, or the public in its aggregate capacity, the generality of the charge did not vitiate the indictment. But they sustained the indictment *ex necessitate rei*, on the ground, that as it was impossible the defendants could have known who would be the purchasers on that day, the charge could not have been more specific. And though it was conceded, that to raise or lower the price of the public funds, was not *per se* a crime, yet it was held to be an offence for a number of persons to conspire to raise them by false rumours; and that the *crime* was not in raising the funds, but in the act of conspiracy and combination to do so, and would be complete, though

The State
vs
Buchanan

DEC. 1821.

The State
vs
Buchanan

It should not be pursued to its consequences. It was clearly therefore on the point of individual injury that the court went. And so in *The King vs. Gill & Henry*, 2 *Barnwell & Alderson*, 204, the defendants were indicted and convicted of a conspiracy by divers false pretences, and subtle means and devices, to cheat several individuals by name. The prosecution in that case could not have been sustained, on the ground, as has been supposed, that it was for a conspiracy to commit an offence, indictable of itself under the statute 30 *George II*, against cheating by false pretences; for it is well settled, that in an indictment framed upon that statute, it is not enough to allege generally, that the cheat was effected by divers false pretences, &c. but the particular false pretences must be stated, that the party may know against what he is to defend himself, and that the court may see that there is an indictable offence charged, as there are some pretences which are not within the statute. 2 *T. R.* 586. *East's Crown Law*, 837. So in an indictment at common law for cheating by false public tokens, and so also in an indictment on the statute 33 *Henry VIII*, against cheating by false privy tokens, &c. 3 *Chitty's Criminal Law*, 999. 2 *Strange* 1127. If then the conspiracy in that case was only indictable, because it was to commit the statutory offence of cheating by false pretences, as they would form the principal ingredient of the offence, it would have been necessary to set out the particular false pretences by which the cheat was intended to be effected, in order to show that it was the statutory offence which the conspirators intended to commit—on the acknowledged principle, that every indictment must contain a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted. But it was there ruled by the court, that when several persons have once agreed to cheat a particular individual of his money, although they may not at the time have fixed on any particular means for that purpose, the offence of conspiracy is complete, and that it was sufficient to state the conspiracy and the object of it in the indictment, without setting out the means by which it was intended to be accomplished; and per Lord *Mansfield*, in the case of *The King vs. Eccles*, “they may be perfectly indifferent.” It is evident therefore that the indictment was not supported on the ground,

DEC. 1821.

The State
vs
Buchanan

that it was a conspiracy to commit an indictable offence; for if it had not been for a conspiracy to cheat, but against an individual, for the actual commission of the offence, it would have been bad for the generality of the allegation; and the principles of that case embrace every thing that is necessary to the support of the indictment against these defendants. The case of *The King vs. Mawbry and others*, 6 T. R. 619, was a conspiracy to pervert the course of justice, which is of itself an indictable offence. That case has no other bearing on the present, than as it shows that all indictable conspiracies are not embraced by the statute 33 Edward I, but that at common law a conspiracy to do any thing which the law forbids is indictable. In *The King vs. The Journeymen Tailors of Cambridge*, 8 Mod. 10, recognized in *The King vs. Mawbry and others*, 6 T. R. 636, the defendants were indicted at common law, and not on the statute of George, for a conspiracy to raise their wages; and it was held, that the conspiracy was indictable at common law, though it would have been lawful for either of them to raise his wages if he could. So in *The King vs. Delaval*, 3 Burr. 1434, which was a conspiracy to place a girl by her own consent in the hands of Delaval for the purpose of prostitution. The act of seduction was not of itself an indictable offence, but it was the end, the immoral object of the conspiracy, which gave it its criminal character. And the case of *The King vs. Lord Grey*, is of a similar description. In 1 Hawk. P. C. 190, ch. 72, it is said, "there can be no doubt, that all combinations whatsoever, wrongfully to prejudice a third person, are highly criminal at common law." This is literally adopted and transcribed into 1 Burn's Justice 378, and 3 Wilson's Works 118. Chitty in his 3 Vol. on Criminal Law, 1159, says, "in a word all confederacies wrongfully to prejudice another, are misdemeanors at common law, whether the intention is to injure his property, his person or his character;" and in 4 Blk. Com. 137, (Christian's note 4,) "every confederacy to injure individuals, or to do acts which are unlawful, or prejudicial to the community, is a conspiracy." The concurring testimony of these writers, that, all conspiracies wrongfully to injure a third person are indictable offences, is not lightly to be received, though the positions laid down are not assumed as full and definite descriptions of the crime of conspiracy; yet they go quite

far enough for all the purposes of this prosecution. Indeed the four first were only treating of conspiracies levelled against individuals. And such is the character of conspiracy, so ramified is it in its nature, the object and tendency of it being that, from which it derives its criminality, that it would be exceedingly difficult to give a single specific definition of the offence. But by a course of decisions running through a space of more than four hundred years, from the reign of *Edward III*, to the 59 of *George III*, without a single conflicting adjudication, these points are clearly settled:—

DEC. 1821.

The State
vs
Buchanan

1st. That the offence of conspiracy is of common law origin, and not restricted or abridged by the statute 33 *Edward I*.

2d. That a conspiracy to do any act that is criminal *per se*, is an indictable offence at common law, for which it can scarcely be necessary to offer any authority.

3d. That an indictment will lie at common law—1st. For a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only—as in *The King vs. Lord Grey* and others, and the case of *Sir Francis Blake Delaval*. 2d. For a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose, which has a tendency to prejudice the public—as in *The King vs. The Journeymen Tailors of Cambridge*, for a conspiracy to raise their wages, either of whom might legally have done so, and *The King vs. Edwards* and others. 3d. For a conspiracy to extort money from another, or to injure his reputation by means not indictable if practised by an individual, as by verbal defamation, and that, whether it be to charge him with an indictable offence or not—as in *Timberly and Childe; Child vs. North & Timberly; The Queen vs. Armstrong, Harrison* and others; *The Queen vs. Best* and others; *The King vs. Kinnersly & Moore; The Queen vs. Martham Brian; The King vs. Parsons* and others, and *The King vs. Rispal*. 4th. For a conspiracy to cheat and defraud a third person, accomplished by means of an act which would not in law amount to an indictable cheat, if effected by an individual—as in *Breerton & Townsend; The King vs. Skirrett* and others; *The Queen vs. Macarty & Fordenborough; The Queen vs. Orbell; The King vs. Wheatly*, and *The King vs. Lara*. 5th. For a malicious conspiracy, to impoverish or ruin a third person in his

DEC. 1821. trade or profession—as in *The King vs. Cope* and others; *The King vs. Eccles*; *The King vs. Leigh* and others, (*Macklin's case*,) and the case of *Clifford vs. Brandon*. 6th. For a conspiracy to defraud a third person by means of an act not *per se* unlawful, and though no person be thereby injured—as in *The King vs. Robinson & Taylor*; *The King vs. Berenger* and others, and *The King vs. Edwards* and others. 7th. For a bare conspiracy to cheat or defraud a third person, though the means of effecting it should not be determined on at the time—as in *The King vs. Gill & Henry*. 8th. That a conspiracy is a substantive offence and punishable at common law, though nothing be done in execution of it—as in the *Book of Assises*, ch. 44; the *Poulterer's case*; *The King vs. Edwards* and others; *The King vs. Eccles*; *The King vs. Berenger* and others, and *The King vs. Gill & Henry*; and all the authorities that the conspiracy is the gist of the offence. And 9th. That in a prosecution for a conspiracy, it is sufficient to state in the indictment, the conspiracy and the object of it; and that the means by which it was intended to be accomplished need not be set out, being only matters of evidence to prove the charge, and not the crime itself, and may be perfectly indifferent—as in *The King vs. Eccles*; and *The King vs. Gill & Henry*.

From all which it results, that every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is at common law an indictable offence, though nothing be done in execution of it, and no matter by what means the conspiracy was intended to be effected; which may be perfectly indifferent, and makes no ingredient of the crime, and therefore need not be stated in the indictment. In 1 *Tremaine's P. C.* 82, 33, there is an information against *Turner* and others, for a conspiracy to destroy the reputation of one *George Green*, and falsely to charge him with adultery with the wife of one of the conspirators, for the purpose of extorting money from him. In 86, against *Record* and others, for a cheat practised on *Lady Dorothea Seymour*, in prevailing on her by means of a falsehood to advance large sums of money to them. In 91, against *Wilcox* and others, for cheating by conspiracy one *John Dutton* of a quantity of cloth, under pretence of buying

The State
vs
Buchanan

them. In 94, against *Taydler* and others, for a cheat by conspiracy, in drawing an absolute conveyance to themselves of the estates of two women, and persuading them to execute it, pretending it was only in trust for the women, &c. And in 97, against *Allibone* and others for cheating by conspiracy one *Hilliard*, in obtaining divers bonds from him for the payment of money to themselves and others, as a consideration for procuring a marriage between him and an indigent woman, whom they represented as being rich. In neither of those cases, could an indictment have been sustained for the same injury practised by an individual, without the aid of conspiracy or combination; and as *Tremaine* gives the terms, the reigns, and the names of the respective parties, there can be little doubt, that they are precedents of informations in adjudicated cases, and that they were held to be good; and they go far to show how the common law was understood in *England* in the reigns of *Charles* and *James II.* And the law of conspiracy, as settled by the uniform tenor of the decisions of the courts in *England*, has been recognized and adopted as the common law, by the courts of several of the sister states; as in *The Commonwealth vs. Ward* and others, 1 *Mass. Rep.* 473. *The Commonwealth vs. Judd* and others, 2 *Mass. Rep.* 329; and *The Commonwealth vs. Tibbitts & Tibbitts*, *ibid* 536; and the cases of *The Journeymen Cordwainers* in *New-York* and *Pennsylvania*; and also in a similar case in this state, by the court of oyer and terminer, &c. for *Baltimore* county, which has it is believed been entirely acquiesced in. In 2 *East's C. L.* title *Cheat*—cheats by conspiracy are treated of, as being on the same footing with cheats effected by the use of false public tokens, as false weights and measures. *Chitty* in his 3 *vol.* title *Conspiracy*, after speaking of indictable conspiracies levelled at individuals, says, “but the object of conspiracy, is not confined to an immediate wrong to particular individuals, it may be to injure public trade, to affect public health, to violate public police, to insult public justice, or to do any act in itself illegal.” Thus taking a clear distinction between indictable combinations to injure individuals, and such as have for their object an injury to the public at large, or the commission of acts which are in themselves illegal. And in page 1140 he says, “that to constitute a conspira-

Dec. 1821.
The State
vs
Buchanan

DEC. 1821.

The State
vs
Buchanan

cy, it is not necessary that the act intended should be in itself illegal, or even immoral; that it should affect the public at large; or that it should be accomplished by false pretences." Conspiracies are odious in law, and are always taken *mala parte*, and properly. In *The King vs. Rispal*, it was said by Lord *Mansfield* in delivering the opinion of the court, that "they tended to a breach of the peace, as much as cheats or libels." That is the only reason assigned in the books why libels are punishable by indictment; and whether they have in fact a more direct tendency to a breach of the peace, than verbal slanders, which are not *per se* so punishable, it is now too late to inquire—the law is settled, whether the reason be good or bad. There is however a greater malignity of spirit displayed, and a deeper and more lasting mischief contemplated by a deliberately written libel, than by a mere verbal slander, which is often repented of almost as soon as it is uttered. Libels therefore furnish evidence of a disposition, more dangerous to the social order, than verbal slanders, against the effect of which, the law has interposed itself, as a necessary safeguard. So at common law, a cheat effected by false public tokens, as "false weights and measures," is punished *criminaliter*, not because the party cheated is more injured in that way, than by a mere private cheat accomplished by an individual in any other manner, which is not indictable; but because it is *that*, against which ordinary care and prudence are not sufficient to guard; and the *use* of which evinces a disposition to practice upon the whole community. And for the same reason fraudulent, false or malicious conspiracies, to cheat or otherwise injure a third person, are indictable offences; for that ordinary care and prudence, which would be a sufficient guard against the evil designs of an individual, furnish no protection against the machinations of a band of conspirators. *The King vs. Turner* and others, 13 *East's Rep.* 228, has been much relied upon by the counsel for the defendants in error; but the case itself is not at all in hostility with this principle, or with any of the adjudications to which we have had occasion to advert. It was an agreement only, (in the words of Lord *Ellenborough* by whom it was decided) "to go and sport upon another's ground;" not tainted either with malice, falsehood or fraud. And an agreement

to commit a civil trespass, (for every unauthorised entry upon the possessions of another, though it only be for the purpose of innocent amusement, is in law a trespass) may not, according to circumstances, amount to an indictable offence. But fraud, falsehood and malice, strike at the very root of the social order, as the well being of a community greatly depends on the honesty, truth, and properly regulated passions of those who compose it; and therefore it is necessary that the law should punish them whenever they assume a shape, against the effect of which ordinary care and prudence are not sufficient to guard.

There is nothing in the objection that to punish a conspiracy where the end is not accomplished, would be to punish a mere unexecuted intention. It is not the bare intention that the law punishes, but the *act of conspiring*, which is made a substantive offence, by the nature of the object intended to be effected. And in that respect, conspiracies are analogous to unlawful assemblies. An unlawful assembly, is the assembling of three or more together to do an unlawful act, as to pull down enclosures, and departing without doing it, or making any motion towards it. In that case it is not the bare *unexecuted intention* which the law punishes, but it is the *act of meeting*, connected with the *object* of that meeting, which constitutes the offence; and for that *act of meeting* alone, though it should be to do, what if actually done by one, (as the pulling down of another's enclosures,) would be but a civil trespass, the parties are liable to be punished by fine and imprisonment. And why should the law favour the *act of conspiring* together, falsely to injure the reputation of another, maliciously to ruin him in his occupation, or fraudulently to cheat him of his property, (no matter by what means,) and yet punish the *act of meeting* together to pull down another's fence, without making any motion towards it?

But it is contended, that if our ancestors brought with them the common law of the mother country, or any part of it, it was the common law so far only as it had been established by judicial precedents, at the time of their emigration, and not as it has since been expanded in *England* by judicial decisions. That our ancestors did bring with them the laws of the mother country, so far at least as they

DEC. 1821.

The State
vs
Buchanan

DEC. 1821. were applicable to their situation, and the condition of an infant colony, cannot be seriously questioned. The rule that "in conquered or ceded countries that have laws of their own, those laws continue in force, until actually altered," &c. is for the benefit and convenience of the conquered, who submit to the government of the conquerors, or in the case of cession, for the benefit of the people, who by *treaty* submit to the government of those to whom their country is ceded, and was not applicable to the condition of our ancestors, as the *Indians* did not submit to their government, but withdrew themselves from the territory they acquired. They were therefore in the predicament of a people discovering and planting an uninhabited country; and as they brought with them all the rights and privileges of native *Englishmen*, they consequently brought with them also, as their birthright, all the laws of *England*, which were necessary to the preservation and protection of those rights and privileges. And it would be difficult to show, that the law of conspiracy was not, at the time of their emigration, quite as necessary to them here in their new and colonial condition as it was in *England*, unless it can also be shown, that there was less necessity here, than there, for the preservation of life, liberty, reputation and property, or protection against falsehood, malice and fraud. If then they did bring with them the common law of conspiracy, which is assumed as undeniable, (though it may have existed potentially only,) they brought it as it is now settled and known in *England*; for what it is now, it was then, if any reliance can be had on ancient authorities; and it is to judicial decisions, that we are to look, not for the common law itself, which is no where to be found, but for the evidences of it. It appears, as has been seen by a note of a case in the *Book of Assizes*, 27 *Edward III*, that an indictment was sustained at common law for a conspiracy, though nothing was done in execution of it. The same principle is recognized and adopted in 9 *Coke's Rep*, 56, (*The Poulter-er's case*,) in its fullest extent; and that is the great principle running through the cases so much objected to in argument, that conspiracies are substantive punishable offences, though they be not executed; and the rest, that it is sufficient to state in the indictment the conspiracy and the object of it, that the means by which it was intended

The State
vs
Buchanan

DEC. 1821.

The State
vs
Buchanan

to be effected, are but matters of evidence to prove the charge, and no part of the crime itself, and may be perfectly indifferent, and need not therefore be set out, are but consequences. And in the case of *Breerton & Townsend, Noy's Rep.* 103, (12 *James I.*) an indictment was held to lie, as has been seen, for a conspiracy to defraud another by means of an act, which if it had been effected by an individual, would not have been indictable. The case in *Noy*, in which the parties were punished by *fine*, also shows, that the villenous judgment was not given in all cases of conspiracy, but that there were at common law, different degrees of punishment, and consequently of crime; and in 1 *Hawk. P. C.* 193, *ch.* 72, *s.* 9, it is said, that it has never been settled to be the proper judgment upon any conviction of conspiracy, except such as threatened the life of the party, which obviates any argument drawn from the villenous judgment, against there being any other conspiracies at common law than those enumerated in the statute 33 *Edward I.* These cases were before the colonization, the charter being in the eighth year of the reign of *Charles I.* and they furnish the leading principles of the doctrine of conspiracy, of which the subsequent decisions are but practical applications, and must be received as expositions of the law as it before existed, and not as creating a new law, or altering the old one, which could only be done by legislative enactment; and cannot be assimilated to occasional alterations, or changes in the practice of courts, in relation to the forms of proceeding, which are only creatures of courts, and often go on mere fiction. And it is a mistake to suppose, that they are *expansions* of the common law, which is a system of principles not capable of expansion, but always existing, and attaching to whatever particular matter or circumstances may arise and come within the one or the other of them; not that this or that combination, is by the common law in terms declared to be an indictable conspiracy, but that it falls within those principles of the common law, which have for their object the preservation of the social order, in the punishing such combinations as are calculated to threaten its well being. Precedents therefore do not constitute the common law, but serve only to illustrate principles. And if there were no other adjudications on the subject to be found, the ju-

DEC. 1821.

The State
vs
Buchanan

dicial decisions since the colonization, furnish conclusive evidence, not only of what is now *understood to be* the law of conspiracy in *England*, so far as those decisions go, but of what were always the principles on which that law rests. And if the political connexion between this and the mother country had never been dissolved, the expression of a doubt would not now be hazarded on the question, whether the same law was in force here. And unlike a positive or statute law, the occasion or necessity for which may long since have passed away, if there has been no necessity before, for instituting a prosecution for conspiracy, no argument can be drawn from the *non user* for resting on *principles* which cannot become obsolete, it has always potentially existed, to be applied as occasion should arise. If there had never been in *Maryland*, since the original settlement of the colony by our ancestors, a prosecution for murder, arson, assault and battery, libel, with many other common law offences, and consequently no judicial adoption of either of those branches of the common law, could it therefore be contended, that there was now no law in the state for the punishment of such offences? The *third section* of the *Bill of Rights*, which declares "that the inhabitants of *Maryland* are entitled to the common law of *England*, and the trial by jury according to the course of that law, and to the benefit of *such* of the *English* statutes, as existed at the time of their first emigration, and which by experience have been found applicable to their local and other circumstances, and of such others as have been since made in *England* or *Great Britain*, and have been introduced, used and practised by the courts of law or equity," has no reference to adjudications in *England* anterior to the colonization, or to judicial adoptions here, of any part of the common law, during the continuance of the colonial government, but to the common law in mass, as it existed here, either potentially, or practically, and as it prevailed in *England* at the time, except such portions of it as are inconsistent with the spirit of that instrument, and the nature of our new political institutions. And surely it cannot be inconsistent with, or repugnant to the spirit and principles of republican institutions, whose strength lies in the virtue and integrity of the citizen, to correct the morals and protect the reputation, rights and property of individuals, by punishing corrupt

DEC. 1821.

The State
vs
Buchanan

combinations, falsely to rob another of his reputation, maliciously to ruin him in his business, or fraudulently to cheat him of his property. If it is, the law of libel, and for punishing cheats effected by false public tokens, should also be rejected; for the one is not more inconsistent with the personal liberty of the citizen than the other, or at all more necessary to the preservation of the social order, and they all rest upon the same principle. And that clause in the *third section* of the *Bill of Rights*, which declares the inhabitants of *Maryland* to be entitled to the benefit of such *British* statutes made since the emigration, as had been introduced, used and practised by the courts of law or equity, and thus virtually inhibits the use of all such as had not been so introduced, furnishes a clear exposition of the whole section, and shows, that it was not the intention of the framers of that instrument to exclude any part of the common law, merely because it had not been introduced and used in the courts here, and strongly implies, that there were portions of that valuable system which had not been actually practised upon. And the judicial proceedings of our courts furnish no evidence of any prosecution before the revolution, for a cheat effected by false public tokens; and yet it is not pretended, that from the *non user*, it is not now an indictable offence.

It is not necessary, as has been contended on the part of the defendants in error, that every one should in fact know what the law is, before he can be punished for what the law forbids. Such a doctrine would be fraught with the most mischievous consequences to society: it is enough that the *offence* was known to the *law* before, and if it be *malum in se*, there is an inward monitor, always present, to warn, advise and instruct. Nor is it any argument against the law of conspiracy, as contended for on the part of the prosecution, that under the *English* decisions, the *act* of conspiring is not required to be proved by positive testimony, but may be inferred by the jury from all the circumstances of the cases. It has nothing to do with the question of what is, or is not an indictable conspiracy; and if it be an objection at all, it is one that arises upon the law of evidence, and is equally applicable to every description of conspiracy. But we cannot perceive what there is in it to quarrel with. It is not confined to the offence of conspiracy—Murder, which reaches

DEC. 1821. the life of the offender, and various other crimes, may be proved by circumstantial evidence; and there does not seem to be any thing in the crime of conspiracy, that should exempt it from being proved by the same species of evidence. On the contrary, as conspiracies from their very nature, are usually entered into in secret, and are consequently difficult to be reached by positive testimony; it would appear to be peculiarly necessary and proper to permit them to be inferred from circumstances, otherwise the most dangerous and injurious conspiracies would often go unpunished.

The State
vs.
Buchanan

I have endeavoured to avoid bringing any thing into this case, which does not strictly belong to it, or assuming any principle that is not well settled. The indictment has two counts, the *first* charges the defendants with an executed conspiracy, falsely, fraudulently and unlawfully, by wrongful and indirect means, to cheat, defraud and impoverish *The President, Directors and Company of the Bank of the United States*; and the *second*, charges them with a conspiracy only, falsely, fraudulently, and unlawfully, by wrongful and indirect means, to cheat, defraud and impoverish *The President, Directors and Company of the Bank of the United States*. *James A. Buchanan*, one of the defendants, was the President of the office of discount and deposit of the mother bank, duly established in *Baltimore*; *James W. McCulloh*, another of the defendants, was the Cashier of that office, and *George Williams*, the other defendant, was a Director of the mother bank in the city of *Philadelphia*; and it has been contended, that as an improper use, or embezzlement of the funds of the bank, by either the President or Cashier of the office, would in law be only a breach of trust, a *combination* to effect the same purpose cannot amount to an indictable offence. But however ingeniously urged, there does not appear to be any thing in the argument, when stripped of the dazzling attire in which it was clothed. Seeing, as has been shown, that to constitute an indictable conspiracy, it is not necessary that the act conspired to be done, should, if effected by an individual, be such, as would *per se* amount to an indictable offence. It seems therefore to be perfectly clear, both on principle and authority, that the matter charged in each count in the indictment, constitutes a punishable conspiracy at common law, and that that portion of the common law is in force in this state.

DEC. 1821.

The State
vs
Buchanan

The only question remaining to be examined, that is, whether under the constitution and laws of the *United States*, the county court of *Harford* had jurisdiction of the offence in this particular case, (the Bank of the *United States* being chartered by an act of congress,) requires but little to be said, and will be disposed of in a few words. A conspiracy to cheat or defraud the bank, is not declared to be an offence against the *United States* by any act of congress, and in the case of *The United States vs. Hudson & Goodwin*, 7 *Cranch*, 32, it was decided by the supreme court, that the courts of the *United States* had no common law jurisdiction in criminal cases. The authority of which case is recognized in the case of *The United States vs. Coolidge* and others, 1 *Wheaton*, 415, and until it shall be overruled by the same tribunal, the principle must be considered as settled. The matter therefore charged in the indictment is not an offence against the *United States*, nor cognizable in any of their courts; but a common law offence against the state of *Maryland*—the act of congress creating the bank, and the establishment of the office of discount and deposit in the city of *Baltimore* within the territorial jurisdiction of the state, furnishing only the occasion for the offence, by bringing into existence the thing, upon which the fraud is charged to have been committed. And as the previously vested jurisdiction of the state, cannot be supposed to be taken away, by the mere potential right of congress (supposing it to exist) to make a conspiracy to cheat the bank, an offence against the *United States*, and to give exclusive jurisdiction thereof to the *United States* courts, without any exercise of that right, the original common law jurisdiction of the courts of the state, in relation to this subject, remains as it was before the adoption of the federal constitution, and will so continue to remain, until that right shall be exercised by congress to its exclusion. Whether a concurrent jurisdiction would be denied to the courts of the state, if congress had in fact vested jurisdiction of this matter in the courts of the *United States*, it is not now necessary to inquire, the exclusive jurisdiction being in the courts of the state. It will be time enough to examine that question when it shall be regularly presented to us.

It has been urged on the part of the defendants in error, as an objection to the jurisdiction of the courts of the

DEC. 1821. state, in such a case as this, that the principle would be dangerous to the well being of the bank, as it might lead to the passing of laws by the state legislature, calculated to destroy the institution, under pretence of protecting its interests. It may be admitted, that the legislature of the state has no right to pass laws calculated to control or impede the operations of the bank. But it is difficult to imagine, how a general power in the judicial tribunals of the state, to punish an offence against the *State*, can be considered as an unconstitutional interference with the concerns of the Bank of the *United States*, or as in any manner endangering its security, only because its officers happen to be the objects of the prosecution, and the offence is charged to be, to the prejudice of that institution; which for the purpose of the prosecution is considered as an individual.

The State
vs
Buchanan

CHASE, Ch. J. (*a*.) In this case four questions have been submitted to the court for their consideration—

1. Whether the state has the right to issue a writ of error in this case?
2. Whether the record has been legally and properly transmitted?
3. Whether the court has jurisdiction over this case?
4. Whether the facts charged in the indictment constitute the offence of conspiracy at the common law?

1. As to the first. This is a question which arises on demurrer to the indictment, and is solely and exclusively a question for the court to decide on the legal sufficiency of the indictment.

If the facts charged constitute the crime of conspiracy at the common law, it is a misdemeanor, and is punishable by fine and imprisonment. Supposing, for argument sake, the court below had determined the indictment was sufficient, and the offence a conspiracy at the common law, there cannot be a question but that the defendants would have had a right to a writ of error, to have the judgment of the court below reviewed, and the law settled. Where the offence is a misdemeanor, it is the right of the party to have a writ of error *ex debito justitia*—the allowance of the attorney general in *England* is a matter of course, and never refused. In this state the allowance of the attorney-general is not necessary, and never applied for. What good reason can be assigned why the state should not have

(*a*) Owing to indisposition the Chief Judge did not attend when the opinion of the court was delivered in this case.

DEC. 1821.

The State
vs
Buchanan

a writ of error? The right ought to be reciprocal, at least in the case of a misdemeanor. In the Marquis of *Winchester's* case, reported in Sir *William Jones and Croke Charles*, the right of the king to a writ of error was not questioned. The right of the party accused to bring a writ of error was taken away by the words of the statute of *James I, ch. 3*; but the right of the king remained—the king not being named in the statute. The offence charged, was recusancy and a misdemeanor, which subjected the party to a fine. This case unequivocally establishes the right of the King to bring a writ of error in the case of a misdemeanor; the court of King's Bench acted on the record returned under it, and pronounced a judgment of reversal. The defect in the judgment in the court below, was the want of the *ideo capiatur*. The motives which induced the king, or the attorney-general, to issue the writ of error, could not have been a subject of inquiry in the superior court.

2. As to the question whether the record has been legally and properly transmitted?

I am of opinion that the record has been legally transmitted, and is properly before the court. The act of 1713, *ch. 4*, provides fully for the transmission of records in all cases civil and criminal, and the mode prescribed by that act has been fully and strictly pursued. The *fourth* section of that act directs, that the party appealing, or suing out such writ of error, shall procure a transcript of the full proceedings of the said court, &c. under the hand of the clerk of the said court, and the seal thereof, and shall cause the same to be transmitted to the court, &c. upon which transcript the said court shall proceed to give judgment. The transmission of the record in this case has been made pursuant to the *fourth* section of the act of 1713, *ch. 4*, and in strict conformity to it, and the previous order of the court below is by no means necessary.

3. As to the third question, whether the courts of *Maryland* have jurisdiction over this case?

It is the duty of this court to refrain from, and restrain the inferior courts of this state from the exercise of any jurisdiction and power which exclusively belong to the tribunals of the *United States*. In considering this question, it will be necessary to ascertain the power and jurisdiction of the courts of the *United States*, and to fix, with preci-

DEC. 1821. sion, the line of division between them and the state courts.

The State
vs.
Buchanan

By the *third* article, and *first* section of the constitution of the general government, the judicial power of the *United States* shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. By the *second* section, the judicial power shall extend to all cases in law and equity, arising under the said constitution, the laws of the *United States*, &c. These sections of the *third* article comprehend all the powers vested in the judiciary of the *United States*, so far as respects the question under the consideration of the court.

This is not a question or case arising under the constitution of the *United States*, nor under the laws of the *United States*. The law of the *United States*, establishing the Bank of the *United States*, does not create any offence against the *United States*; and it has been determined by the supreme court, that the common law of *England* is not a part of the laws of the *United States*; and that decision has been since recognized and sanctioned, although some of the judges expressed a willingness to hear an argument on the question.

It is a position, not to be controverted, I think, that all power not granted by the constitution to the general government, is still resident in the states, or the people, and is to be exercised in the manner and way the constitutions and laws of the several states respectively prescribe. If the offence charged had been committed prior to the establishment of the constitution of the general government, and during the existence of the first bank of the *United States*, there cannot be a doubt but what it would have been cognizable by the courts of the state in which the offence was committed, and punishable according to the laws of such state. I therefore am of opinion, that the courts of this state have jurisdiction over the offence charged in the indictment.

4. Having disposed of the preliminary questions, and all impediments being removed which were supposed to prevent the consideration of the fourth and last question, I shall now endeavour to express my opinion upon it, and shall do it in as concise and plain a manner as possible, consistent with perspicuity.

The question is important as it concerns the state, and

the individuals accused, and has undergone a very full and elaborate discussion, and nothing has been omitted which splendid talents could urge, or ingenuity invent, to elucidate the subject, and place the question in every view of which it is susceptible; but as it appears to me, it lies within a small compass.

The indictment, after stating the establishment of the Bank of the *United States* by an act of congress, and the relative situation of the accused to the bank and the stockholders thereof, charges "that," &c. [*Here the Chief Judge stated the indictment as herein before set forth.*]

To this indictment there is a general demurrer, by which the facts set forth in the indictment are confessed and admitted by the accused to be true, for the purpose of submitting the question to the decision of the court, whether the facts charged constitute any offence indictable and punishable according to the common law of *England*?

In order to determine this question, it becomes necessary to consider what is the common law of *England* as respects this case, and whether the common law of *England* is the law of this state?

The common law of *England* is derived from immemorial usage and custom, originating from acts of parliament not recorded, or which are lost, or have been destroyed. It is a system of jurisprudence founded on the immutable principles of justice, and denominated by the great luminary of the law of *England*, the perfection of reason. The evidence of it are treatises of the sages of the law, the judicial records and adjudications of the courts of justice of *England*.

The people of *Maryland* have not only recognized the common law of *England* as the law of the state, but by the declaration of rights made by them in convention in 1776, claimed and asserted a right to the common law of *England* as it was then understood in *Maryland*, and had been transmitted to us by the reports of adjudged cases decided by the courts of *England*, and understood by learned men of the profession, who had written on that subject. The common law of *England* was adopted by the people of *Maryland*, as it was understood at the time of the declaration of rights, without restraint or modification. Whether particular parts of the common law are applicable to our local circumstances and situation, and our

DEC. 1821.

The State
vs.
Eucharan

DEC. 1821. *The State vs Buchanan* general code of laws and jurisprudence, is a question that comes within the province of the courts of justice, and is to be decided by them. The common law, like our acts of assembly, are subject to the control and modification of the legislature, and may be abrogated or changed as the general assembly may think most conducive to the general welfare; so that no great inconvenience, if any, can result from the power being deposited with the judiciary to decide what the common law is, and its applicability to the circumstances of the state, and what part has become obsolete from *non user* or other cause.

I think it may be assumed as a position which cannot be controverted, and is free from doubt, that the common law of *England*, as it was understood at the time of the declaration of rights, was the law of *Maryland*; and I think the position is equally clear, that it must be ascertained by the writings of learned men of the profession, by the judicial records and adjudged cases of the courts of *England*.

The questions now occur, Do the facts contained in the indictment constitute the crime or offence of conspiracy? And is conspiracy an offence at common law, indictable and punishable as such?

Sergeant *Hawkins*, in his Pleas of the Crown, *ch. 72*, in defining conspiracy at common law, makes use of strong and explicit language, and says there can be *no doubt* but that all confederacies whatsoever, *wrongfully to prejudice* a third person, are highly *criminal at common law*; as where divers persons confederate together by indirect means to impoverish a third person. This definition is corroborated and supported by adjudged cases in the courts in *England*, and especially in the courts of King's Bench.

In 1 *Lev. 125*, 1 *Burn's Justice*, 355, *The King vs. Sterling* and others, *Brewers of London*—Information for unlawfully conspiring to impoverish the excisemen, by making orders that no small beer, called gallon beer, should be made for a certain time, &c. The whole court concurred in the opinion, and gave judgment for the King.

The statute 33 *Edw. I. de conspiratoribus*, was made in affirmance of the common law, and is a final definition of the instances or cases of conspiracy mentioned in it; but certainly it does not comprehend all the cases of conspiracy at the common law, which is most apparent from the adjudged cases of the courts of *England* on that subject.

I consider the adjudications of the courts of *England*, prior to the era of the independence of *America*, as authority to show what the common law of *England* was in the opinion of the judges of the tribunals of that country, and since that time, to be respected as the opinions of enlightened judges of the jurisprudence of *England*.

DEC. 1821.
The State
vs
Buchanan

The better opinion appears to be, that a conspiracy to do an unlawful act is an indictable offence, although the object of the conspiracy is not executed. In this case the conspiracy to cheat, defraud and impoverish, the Bank of the *United States*, by appropriating the monies, promissory notes, and funds of the bank, to the use of the accused, has been proved by the admission and confession of the defendants, and a consummation of all the overt acts has been fully established.

The *Poulterer's case*, 9 *Coke*, 56, 57—The *falsa alligantia* is a false binding, each to the other, by bond or promise to execute *some unlawful act*. Before the unlawful act executed, the law punishes the coadjunction, confederacy or false alliance, to the end to prevent the unlawful act—*quia quando aliquid prohibetur, prohibetur et id per quod pervenitur ad illud. Et effectus punitur licet non sequatur effectus*; and in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it. The defendants were punished by *fine* and *imprisonment*.

I think it is established by the decisions of the courts of *England*, that a conspiracy to cheat is an offence indictable and punishable at common law—*Rex vs. Wheatly*, 2 *Burr*. 1125. A cheat or imposition by one person only is not indictable at common law, but a conspiracy to cheat by two or more is indictable at common law, because ordinary care and caution is no guard against it. Indictment against *Mucarty* and others, for a combination to cheat in imposing on the prosecutor stale beer mixed with vinegar, for port wine—6 *Mod*. 301. Indictment against *Cope* and others, for a conspiracy to ruin the trade of the prosecutor by bribing his apprentices to put grease into the paste which had spoiled his cards—1 *Strange* 144. Indictment against *Kinnersley* and *Moore*, for a conspiracy to charge Lord *Sunderland* with endeavouring to commit sodomy with said *Moore*, in order to extort money from Lord *Sunderland*. The whole court gave judgment

Dec. 1821. in support of the indictment, and punished *Kinnersley* by fine, imprisonment, &c. and sentenced *Moore* to stand in the pillory, suffer a year's imprisonment, and to give security for his good behaviour—1 *Stra.* 193, 196. Indictment against *Rispa*, 3 *Burr.* 1320—The indictment sets forth, that *Rispa*, and two others, did wickedly and unlawfully conspire among themselves, falsely to accuse *John Chilton* with having taken a quantity of human hair out of a bag, &c. for the purpose of exacting and extorting money from the said *John Chilton*. The court were of opinion, that the indictment was well laid, and that the gist of the offence is the *unlawful* conspiring to injure *Chilton* by this false charge.

The State
vs
Buchanan

A combination among labourers or mechanics to raise their wages, is a conspiracy at common law, and indictable (§ *Mod.* 10,) although lawful for *each separately* to raise his wages.

I consider the doctrine so firmly established by the decisions of the courts of *England*, prior to the era of our independence, that a combination or confederacy to do an unlawful act, is a conspiracy indictable and punishable at common law, that I have deemed it unnecessary to refer to all the cases relative to this question, and therefore have contented myself with citing some of those which appear to me most apposite.

The opinion of Lord *Ellenborough* in *The King vs. Turner and others*, 13 *East*, 230, does not impugn, but strongly sanctions and confirms this doctrine. He says the cases of conspiracy have gone far enough, he should be sorry to push them still further. The charge in the indictment was for committing a civil trespass. He also says, all the cases in conspiracy proceed on the ground that the object of the conspiracy is to be effected by *some falsity*.

I am of opinion that the judgment be reversed, and the demurrer overruled.

JUDGMENT REVERSED.

The counsel on the part of the state moved the court for a writ of *procedendo* to *Harford* county court, directing that court to proceed to a new trial of the prosecution. This was resisted by the counsel of the defendants in error; but THE COURT awarded a writ of *procedendo*.

COURT OF APPEALS, (E. S.) JUNE TERM, 1822. JUNE. 1822.

GORDON vs. TUMER.

Gordon
vs
Tumer.

APPEAL from *Kent* county court. This was an action of debt on a single bill. The facts of the case, as agreed on by the parties, were as follow, viz. The defendant, (now appellee,) executed the single bill, upon which the suit was brought, to the plaintiff, (the appellant,) on the 28th day of January 1808, and that the same remained unpaid. After the execution of said bill, the defendant was committed to the gaol of *Kent* county, at the suit of *George Dashiell*, and others, for want of special bail, and not being indebted to his creditors in the sum of £200 sterling, he applied for the benefit of the act of assembly for the relief of insolvent debtors, passed at March session 1774, *ch.* 28, and its supplements, and was regularly discharged under said acts on the 11th day of May 1808. The plaintiff and defendant, at the time of the execution of said discharge, were both citizens of this state, and the debt now in controversy was returned by the defendant in the schedule of his debts, which accompanied his said application. The defendant, since his discharge, had not acquired, and was not possessed of any property, except what he had acquired by his own industry. On these facts the county court gave judgment for the defendant, and the plaintiff appealed to this court, where the cause was argued before CHASE, Ch. J. BUCHANAN, MARTIN, DORSEY, and STEPHEN, J. by

A discharge of an insolvent debtor under the act of March 1774, *ch.* 28, will not release him of a debt contracted subsequent to the passage of that act, although both himself and his creditor were citizens of this state at the date of such discharge.

Chambers, for the Appellant, and by
Tilghman, for the Appellee.

THE JUDGMENT of the County Court was *reversed*, and judgment given for the appellant for the debt and costs.

COURT OF APPEALS, (E. S.) JUNE TERM, 1822.

WELCH vs. THE STATE, use of SMITH.

APPEAL from *Kent* county court. An action of debt was brought on the 21st of December 1812, on the testamentary action on a testamentary bond of more than 12 years standing, where the person does not become of age until 17 years after the date of the bond, and 4 years before the institution of the suit. A plea of the act of limitations is not a bar to an action bringing the action the institution of

JUNE 1822.

Welch
vs
The State

ry bond executed by *Taracy Smith* and *John Greenwood*, as executors of *T. Smith*, deceased, dated the 7th of August 1791. The defendant, (now appellee,) being a surety in the bond, pleaded *general performance and the act of limitations*. The facts of the case, as agreed upon by the parties, were as follow, viz. *T. Smith* by his will, dated the 11th of March 1791, devised the whole of his real and personal estate to his wife *Taracy*, during her widowhood, excepting £50, to be raised out of his moveable estate, and put out upon interest, till his son, *T. Smith*, arrived at the age of 21, when he was to have the £50, and all the testator's land, to him and his heirs, and the wife to have the interest of the £50 yearly, as it became due. After his wife's death, his whole estate, both real and personal, was to be his son *T. Smith's*, and his heirs, and in case his wife married again, her brother *J. Greenwood* was to take the estate out of her hands, and her interest was to cease in every part of it. He appointed his wife and *Greenwood* joint executors, &c. The testator died about the 1st of July 1791, and letters testamentary were granted on the 17th of August 1791. On the 20th of July 1798, *Greenwood* returned his final account, by which there appeared to be a balance due the estate of the testator, on that day, of £117 13 8. No further accounts appeared to have been returned to the orphans court. *T. Smith*, for whose use this suit is brought, is the son of the testator, and the devisee mentioned in his will, and he became of age in July 1808. *Taracy Smith*, the widow of the testator, intermarried with *A Pearson*, within five months after the testator's death, and was living at the time of the institution of this suit. She had not renounced her interest under the will. No part of the £50 devised to *T. Smith*, nor any other part of the personal estate of the testator, was paid to him, nor was the £50 ever put out at interest for him. On this statement the county court gave judgment for the plaintiff, and the defendant appealed to this court, where the cause was argued before CHASE, Ch. J. BUCHANAN, MARTIN, DORSEY, and STEPHEN, J. by

Chambers, for the Appellant, and by

Tilghman, for the Appellee

JUDGMENT AFFIRMED.

COURT OF APPEALS, (E. S.) JUNE TERM, 1822. JUNE 1822.

BROWN'S EX'r. vs. TILDEN, *et ux.*BROWN
vs
TILDEN

APPEAL from the orphans court of *Queen-Anne's* county.
The cause was argued before CHASE, Ch. J. BUCHANAN,
MARTIN, and STEPHEN, J.

A codicil in the hand writing of the testator, found with his will, reciting the changes and alterations he intended to make in it as to his personal estate, is a good and valid testamentary disposition of such estate, tho' not signed by him, or attested by witnesses

Bullitt and *Carmichael*, for the Appellant.

Chambers and *Rudolph*, for the Appellees.

The opinion of the court, which sufficiently states the facts of the case, was delivered by

CHASE, Ch. J. The question for the decision of the court is, whether the codicil to the will of *James Brown*, made on the 11th day of September 1820, is a good and valid testamentary disposition of his personal estate?

James Brown, in his codicil, begins with reciting, that on the 11th of September 1820, he made his last will in manner and form as therein expressed, wherein he had given to his daughter *Mary*, only an annuity of \$200 *per annum*, and also willed to his son *James*, 150 shares of stock in *The Commercial and Farmers Bank of Baltimore*, which shares he had sold and parted with; and in order to make such alterations as appears right and proper, and being in health of body and of sound mind, &c. he makes the bequests in the codicil mentioned, &c. and concludes, "In testimony that this is my codicil to my last will and testament, I have hereunto set my hand and seal this day of 1820," and sets forth the form of attestation in the usual manner.

It has been proved that the codicil is all in the hand writing of the deceased, and that the will and codicil were found together, contained within the same paper or envelope. It also appears that the deceased was a man of intelligence, and particularly attentive to business.

I am of opinion, that the codicil being in the hand writing of the deceased, and being found with the will, and enclosed together under the same cover, and reciting the changes and alterations he intended to make in his will as to his personal estate, was a good and valid testamentary disposition of his personal estate, without signing his name, or the attestation of witnesses; and that the omitting to do that, which the law does not require, to give validity to a

JUNE 1822. *Jones vs Slubey* testamentary disposition of his personal estate, cannot change or diminish the legal efficacy of the writing, or be construed into a relinquishment of his intention, and convert it into a mere project or plan of a will, and thereby defeat the intention of the testator, indicated in the plainest manner, in a writing professed to be a codicil to his will, and having every essential the law renders necessary to give it validity as a testamentary disposition of personal estate.

The codicil was a valid disposition as soon as it was written, folded up, and put in a place of security.

DECREE AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1822.

JONES vs. SLUBEY.

A conveyance without any valuable consideration, and purely voluntary, in secret trust for the use of the grantor's wife and children, is fraudulent in law, and void as to creditors, who were such before and at the execution of said conveyance.

It is not necessary that a creditor, in order to set aside such a conveyance, should show the grantor to have been insolvent at the time of its execution, it is sufficient that he is considerably indebted to the creditor, and that no other property appears sufficient

to satisfy such debt, other than that contained in the conveyance.

An answer responsive to a bill, is evidence, but only entitled to the same weight that parol evidence is entitled to.

Parol evidence of declarations and intentions, is inadmissible to raise a trust inconsistent or at variance with the expressed intention of a deed, where the facts and circumstances would not of themselves, by implication or construction of law, be sufficient to do so—Nor can such a trust be created for the benefit of a third person, and to defeat a complainant's equity, by an answer alleging declarations on intentions at variance with the expressed intention of a deed.

Land being vested in the wife of N. J. in fee tail, and she and her husband making an absolute conveyance of the same in fee to D. J. and his re-conveying to N. J. the husband, in fee, also by an absolute deed, and the husband more than twelve months afterwards, conveying the same property to M. B. by an absolute deed in fee, are not, of themselves, facts sufficient to raise a trust by implication of law for the benefit of said wife and her children; nor are the answers to a bill in equity, filed to set aside the last conveyance, and to render the property subject to the debts due by N. J. the husband, prior to such conveyance, stating such conveyance to have been made in trust for the benefit of said wife and children, sufficient to sustain the same, and to defeat the object of the bill. Nor is it necessary in such a bill, the wife being dead, and leaving children, to make the children parties.

If a defendant in equity, in answer to a bill for the specific performance of a parol agreement, admits the agreement, and does not rely on the statute of frauds, the agreement will be enforced against him; otherwise, if he relies on the statute.

Where a judgment creditor files a bill for the sale of property to satisfy his debt, a decree that the property be sold, and the proceeds brought into court, to be applied by the court to the payment of such part of the debt as may appear to be due, is correct, provided any part of such debt be due.

Jones, seized and possessed of several houses and lots in the city of *Baltimore*, all of which, on the 14th of May 1808, he voluntarily conveyed to *Mary Brown*, his mother-in-law, for the nominal consideration of five dollars, and she holding said property in secret trust for the appellant, conveyed, at his desire, a portion of the same to *Charles & James Alston*, to secure them for paper loaned to the appellant for discount in the Mechanics Bank of *Baltimore*.

Jones
vs
Slubey

Charles Alston died about two years before the filing of the bill, and *James Alston*, who survived him, was also dead, but before his death became an insolvent debtor, availed himself of the benefit of the insolvent laws, and conveyed all his estate, &c. to *James Sterett*, &c. who now hold the legal title in said property in trust for the appellant, after payment of the debt due, (if any,) to the Mechanics Bank. The bill further stated, that the appellee believed the conveyance from the appellant to *Mary Brown*, was made to evade the payment of the appellee's debt, which was due at the date of said conveyance, though the bond was afterwards executed, or, that if that was not the object, that the same was originally made in secret trust, and will, after the debt due to the bank shall be paid, be held by *Mary Brown*, for the use and benefit of the appellant, who had enjoyed the use and benefit of the property from the time of the conveyance, and was still enjoying it. That no *fieri facias* could be laid on the same, or if it could, that the appellee's remedy would not be complete at law.

Prayer, that the president and directors of the Mechanics Bank of *Baltimore*, and the trustees of *J. Alston*, might discover whether any and what sum of money was due to them from the appellant, &c. That *Mary Brown* might be compelled to disclose the nature of the trust reposed in her by the appellant, by his said conveyance to her; and for a decree to set aside and vacate said conveyance to *Mary Brown*, as voluntary and fraudulent, and for the sale of all of said property, and that the proceeds of the same might be applied to satisfy the appellee's judgment. There was also a prayer for general relief, &c. The answer of *N. S. Jones*, (the appellant,) stated, that he and his brother *D. Jones*, were nephews of the appellee, and about the year 1806 formed a copartnership as merchants in the city of *Baltimore*, under his patronage, and at his express desire, and with a promise from him of aid and assistance. The

JUNE 1822. copartnership existed until the year 1810. In September 1806, he the appellant intermarried with *Frances*, the daughter of *John Brown*, and at that time, and until 1811, was in good credit, and in the constant habit of discharging all his just engagements. *Frances*, at the time of said marriage, was possessed of the property mentioned in the deed of conveyance from herself and the appellant, to *D. Jones*, and held the same in fee tail under a devise to her by her deceased father. *Frances* being desirous to bar the entail, and to settle said property upon herself, and such children as she might thereafter have by the appellant, executed said conveyance, jointly with the appellant, to *D. Jones*, on the 30th of April 1807, and *D. Jones* by his deed dated the same day, reconveyed said property to the appellant, to enable him to create the said trust. The answer further stated, that the appellant afterwards by deed, dated the 14th of May 1808, conveyed said property to his mother-in-law, *Mary Brown*, in fee simple; and although said deed appears on the face of it to be absolute, yet it was intended for the use of the said *Frances*, and her children, agreeably to the original intention of the said *Frances* and the appellant, as before mentioned; and the appellant positively declared, that said entail was barred, for the purpose of creating the aforesaid trust, and that he believed the said *Frances* never would have joined with him in the deed to *D. Jones*, but upon the express condition that the property was to be conveyed by the appellant, in trust for the sole benefit of herself and her children. At the time the appellant executed the deed to *Mary Brown*, he was in good credit. In 1809, the appellee presented to the appellant, and *D. Jones*, the bond mentioned in the bill, and requested them to sign it, alleging it to be the amount due by them to him for goods sold, and money lent them, and observed that the bond was to be taken only for form sake, and to prevent the interference of one *R. S. Thomas*, in the concerns of the appellant and *D. Jones*, the latter being about to marry the daughter of the said *Thomas*. The appellant refused to sign the bond, alleging that it was for a sum much larger than he admitted to be due, and which he offered to show by reference to the accounts between them. *D. Jones* signed the bond, because his uncle, the appellee, threatened to prevent his marriage with *Thomas's* daughter if he did not sign it.

Jones
vs
Slabey

JUNE 1822.

Jones
vs
Slukey

After some weeks, and for the reasons urged by the appellee as before mentioned, and believing that the bond was to be merely nominal, and only intended to cover whatsoever sum might, upon a fair investigation, be found to be justly due to the appellee, and being assured by him that the claim would never be enforced, inasmuch as the appellant and *D. Jones* were his nearest relations, the appellant signed the same. The answer further alleged, that the amount due by the appellant and *D. Jones*, to the appellee, at the execution of said bond, was only \$4821 39. The appellant admitted that suit was instituted on the bond, and judgment obtained against him, he being informed he could make no defence at law; but averred that he ought to have been credited with \$2298 76, and that judgment should only have been entered for the balance, &c. He denied that *Mary Brown* held said property in secret trust for his use; but that the same was conveyed to and was held in trust by her, for the benefit of his five children by his wife *Frances*, she being dead. He also denied that he made the deed to *Mary Brown* for the purpose of evading the appellee's claim, because he did not know, at the execution of said deed, what amount he owed the appellee, there being at that time a running account between the copartnership and the appellee, and that he paid the appellee several sums after the execution of the deed. The answer further states, that *Charles* and *James Alston* became the appellant's endorsers at the Mechanics Bank, and that *Mary Brown*, without the interference of the appellant, executed the deed to the *Alston's* for their security, and that the property mentioned in that deed was not the same property conveyed by the appellant to *Mary Brown*, in trust as aforesaid, but was held by her in her own right. The answer of *Mary Brown* stated, that her deceased husband devised to his daughter *Frances*, in fee tail, all the property mentioned in the deed from *Frances* and her husband, (the appellant,) to *D. Jones*. That *Frances* intermarried with the appellant in September 1806, and after her marriage, being desirous to settle said property upon herself and the children she might have by her said husband, joined with him in the deed to *D. Jones*, dated the 30th of April 1807, for the purpose of barring the entail, and creating said trust; and *D. Jones* on the same day conveyed said property back to the appellant. That the appellant, in order

JUNE 1822. to carry into effect the intention of his wife, did by his deed of the 14th of May 1808, convey to this defendant all said property, in fee simple, but in trust for the use and sole benefit of said *Frances*, and of such child or children as she then had or might have by the appellant. That this defendant paid no money consideration to the appellant for said conveyance to her. She admitted that she conveyed to *C. and J. Alston* the property mentioned in her deed to them, to indemnify them as endorsers for her son-in-law, the appellant, but averred that the said last property was her own individual estate, and that she executed said deed of her own accord. This answer also stated the death of *Frances*, and her leaving five minor children.

Jones
vs
Slubey

The answer of the president and directors of the Mechanics Bank of *Baltimore* stated, that there was due to them from the appellant the sum of \$991 51, being the balance due of a loan made by them to him on notes drawn by *C. and J. Alston*, in favour of and endorsed by the appellant; and that they had no other security for the same except the mortgage from *Mary Brown* to *C. and J. Alston, &c.*

The answer of the trustees of *James Alston* admitted that they were appointed his trustees, he being an insolvent debtor, &c. and that he executed to them, as trustees, a conveyance of all his property on the 27th of March 1813.

Testimony was taken and returned under commissions issued for that purpose. The judgment, deeds, &c. referred to in the bill and answers, were exhibited, but the only exhibits which it seems material to set out are—1. *Exhibit A.* An account current of the complainant against *N. S. and D. Jones*, commencing on the 19th of February 1806, and stating a balance due from the latter to the former on the 13th of May 1809, of \$10,896 73, with the following acknowledgment, viz. "*Baltimore, May 12th, 1809. We hereby acknowledge the above balance of ten thousand eight hundred and ninety-six dollars and seventy-three cents, to be justly due to Nicholas Slubey, exclusive of interest on each advance of cash, and such cash as was received by us from the time of such advance to and receipt by us, which, with interest to be calculated on the above balance until paid, we promise to pay said Nicholas Slubey, his heirs, executors or administrators. Witness our hands and seals the year and day first above written.*"

David Jones, (L S)

Nicholas S. Jones." (L S)

2. *Exhibits C and B J*, are accounts current of *N. S. Jones* and *D. Jones* against the complainant, one of them commencing on the 10th of April 1806, and ending on the 26th of December 1806, leaving a balance due to the complainant of \$4380 57, and the other commencing on the 26th of January 1807, and ending on the 27th of January 1808, leaving a balance, including the above balance, due to the complainant, of \$4919 89.

Jones
vs
Slubey

KILTY, Chancellor, (July term 1819.) The object of the bill is to set aside a deed therein referred to from *N. S. Jones*, one of the defendants, to *Mary Brown*, another defendant, as voluntary and fraudulent, and for the sale of the property mentioned therein, to satisfy a judgment obtained against him by the complainant. The defence set up by *N. S. Jones* is, that the land so conveyed to *Mary Brown* had been the property of *Frances Brown*, the wife of the said *N. S. Jones*, devised to her in fee tail. That she being desirous to bar the entail, and settle the property on herself and such children as she might have, executed a deed, jointly with *N. S. Jones*, to *D. Jones*, who on the same day conveyed it to *N. S. Jones*; and that *N. S. Jones* conveyed the same, about thirteen months after, to *Mary Brown*, in fee, but intended for the use of the said *Frances* and her children, agreeably to the original intention of the said *Frances* and the said *N. S. Jones*. These intentions of the parties are relied on in the argument, as forming a contract, or rather contracts, both before and after the marriage, so as to justify the conveyance to *Mary Brown*. But such contracts would have required a course different from the one pursued, which was an absolute conveyance to *N. S. Jones*. The interest abiding in him for nearly thirteen months, and a conveyance in fee to *Mary Brown*, without any declaration of the trust now set up, and from all the circumstances disclosed in the evidence, I am clearly of opinion that the defence is not sustained, and that the complainant is entitled to relief, inasmuch as the conveyance by *N. S. Jones* debarred him of his remedy at law on the judgment. The counsel may therefore prepare a decree to set aside the deed from *N. S. Jones* to *Mary Brown*, and for a sale of the property conveyed thereby. Whether the property conveyed by *Mary Brown* for the indemnity of the *Als-*

JUNE 1822. *tons*, is to be referred to in the decree, will depend on its being the same, or different. And the question as to the application of the proceeds to that object, will depend on the same question. The amount due to the complainant may also be a subject for the report of the auditor, concerning which it was contended, that the bond was given for more than was due, and that the money advanced was intended as a present.

Jones
vs
Slubey

The chancellor afterwards decreed—"that the deed executed by the defendant, *N. S. Jones*, on the 14th of May 1808, for conveying certain real estate therein mentioned to the defendant, *Mary Brown*, be and the same is hereby annulled, vacated, and set aside as fraudulent." "That the real estate in the said deed and proceedings mentioned, or such part as may be necessary, shall be sold," &c. From which decree the defendant, *N. S. Jones*, appealed to this court.

The cause was argued before BUCHANAN, EARLE, MARTIN; and STEPHEN J.

Wirt, (Attorney General of U. S.) and *Moale*, for the appellants, contended, 1. That the complainant was not a creditor of *Jones* when the deed from him to *Brown* was executed, and that therefore said deed, although voluntary, if *bona fide*, could not be impeached by the complainant, though he might be a subsequent creditor.

2. That the execution of the acknowledgment of the claim, *exhibit A*, (called in the bill a bond,) was obtained under false pretences, and could only cover whatever sum of money should be found due upon a fair investigation and settlement of accounts between the complainant and *Jones*. That the account itself was incorrect, and contained charges for money not owing from the latter to the former.

3. That the deed of May 1808, was not made by the appellant to *Brown*, for the purpose of evading the payment of the complainant's judgment, or the obligation upon which it was rendered. That the appellant was solvent at the time that deed was executed, and continued solvent for three years afterwards; and that there was no proof that he ever was in insolvent circumstances.

4. That the deed of 1808 was the completion of a marriage settlement of the property of Mrs. *Jones*, the wife of the appellant, upon herself and children, executed

after marriage, in pursuance of an ante-nuptial parol contract; and if *bona fide* was valid against general creditors. JUNE 1822.

5. That the property mentioned in the deed of 1808 was conveyed in trust for the use of Mrs. Jones for life, remainder in special tail to the children of the appellant and wife—That this deed was made for a valuable consideration, and *bona fide*, and was therefore valid against creditors, although executed after marriage.

Jones
vs
Slabey

They contended that the marriage settlement consisted of the deeds of 1807 and 1808—the first was the consideration, and the latter the completion of the settlement. That the bill was in the nature of a bill of discovery, and the answers, being responsive to it, declared the whole truth, and were evidence of the entire extent and nature of the trust. That the credit due to the answers was conclusive, and they would avail against one witness, unless there were corroborating circumstances of the truth of his testimony. The defendants were called on to disclose, and there was no witness produced to refute the declaration of the trust set out in the answers. That it was immaterial whether the parol contract was made before or after marriage, as it was prior to any right or claim which the appellant had to the property. They also urged, that a parol agreement before marriage furnished a consideration sufficient to support a settlement after marriage. That courts of equity had always shown great alacrity in admitting circumstances to bring those settlements, after marriage, within the support of a valuable consideration. They cited 1 *Eq. Ca. Ab.* 354. *White vs. Drake*, 1 *Keb.* 6. 1 *Vern.* 440. *Ralph Bovey's* case, 1 *Vent.* 193. *Rob. on Fraud. Convey.* 218. *Lloyd vs. Fox*, 2 *Keb.* 700. *Griffin vs. Stanhope*, *Cro. Jac.* 454. *Rob. on Fraud. Convey.* 220. *Lavender vs. Blackstone*, 2 *Lev.* 146. *Dundas vs. Dutens*, 1 *Ves. jr.* 196. In the case at bar they contended, that the consideration for the post-nuptial settlement was valuable and *bona fide*, and valid against purchasers, and *a fortiori* valid against general creditors. They referred to *Pre. in Chan.* 101; and 3 *Eq. Ca. Ab.* 715. A settlement after marriage made upon the payment of money as a portion, or of an additional sum, or even on an agreement to pay, if such payment is afterwards made, is good against subsequent creditors. For this they referred to *Brown vs. Jones*, 1 *Atk.* 190. *Wheeler vs.*

JUNE 1822. *Caryl, Ambl.* 121. *Jewson vs. Moulson*, 2 *Atk.* 417. *Mid-
dlecomb vs. Marlow*, *Ibid* 520. *Jones vs. Marsh*, *Ca. Temp.*

 {
 Jones
 vs
 Slubey

Talb. 64. *Hamsden vs. Hilton*, 2 *Ves.* 304. *Ward vs. Shal-
lett*, 2 *Ves.* 18. *Russell vs. Hammond*, 1 *Atk.* 13. They
 further contended, that either of the following considera-
 tions, moving from a wife, would support a settlement *after*
 marriage—1st. Relinquishment of the wife's interest under
 a former settlement. 1 *Eq. Ca. Ab.* 49, 23. 2d. Relin-
 quishing an interest under a bond, even although such in-
 terest be contingent. *Ward vs. Shallett*, 2 *Ves.* 16. 3d. Re-
 linquishment of a jointure. *Ball vs. Burnford*, *Pre. in Chan.*
 113. *Scott vs. Bell*, 2 *Lev.* 70. *Cottle vs. Frippie*, 2 *Vern.*
 220. 1 *Bro. P. C.* 444. 4th. Parting with a right of dower,
Lavender vs. Blackstone, 2 *Lev.* 147. 5th. The wife's
 concurring with her husband in destroying a settlement
 upon her children—as joining in levying a fine to destroy
 contingent remainders. *Scott vs. Bell*, 2 *Lev.* 70. And 6th.
 Parting with her own estate, or making a charge upon it
 in favour of her husband. *Clark vs. Nettleshut*, 2 *Lev.* 148.
Chapman vs. Emory, *Cowp.* 278.

They also contended that the children of Mrs. Jones
 ought to have been made parties.

Winder and *Magruder*, for the appellee, relied upon
Randall vs. Morgan, 12 *Ves.* 74. *Lloyd & Molte vs. Inglis*,
 1 *Desaus. Cha. Rep.* 333. *Stoddert vs. Hoyer*, and *Farrow*
vs. Teackle, in this court; and *Atherley*, 212, 216.

BUCHANAN, J. delivered the opinion of the court. We
 can perceive nothing amiss in the chancellor's decree.

The exhibit *A*, the instrument of writing upon which the
 suit at law was instituted, is an acknowledgment on the
 12th of May 1809, under the hands and seals of the de-
 fendant *Nicholas S. Jones*, and *David Jones*, (who were
 partners in trade,) at the foot of an account current be-
 tween them and the complainant, from the 19th of Februa-
 ry 1806, of a balance due on that account to the com-
 plainant of \$10,896 73, with a promise to pay the amount;
 and according to the account itself it appears, that on the
 25th of April 1808, they were indebted to him upwards of
 \$8,000. By the exhibits *C* and *B J*, which are accounts
 rendered by *Nicholas S. Jones* and *David Jones* themselves,
 purporting to be accounts current between them and the
 complainant for the years 1806 and 1807, there appears to

have been a balance due to the complainant, on the 27th of January 1808, of nearly \$5,000; and *Nicholas S. Jones*, in his answer, admits, that at the time of executing the acknowledgment at the foot of the complainant's account, there was a balance due to him, of \$4821 39. So that, whether the amount actually due was equal to the sum claimed by the complainant, and acknowledged by the defendant *Nicholas S. Jones*, and *David Jones*, or not, it is manifest that a large amount was due. The bill alleges, that the deed to *Mary Brown* of the 14th of May 1808, was made to evade the payment of the complainant's debt, or in secret trust for the use of *Nicholas S. Jones*; and seeks a disclosure in relation to that deed only, for the purpose of setting it aside, and subjecting the real estate therein mentioned, to be sold to satisfy the judgment obtained by the complainant against *Nicholas S. Jones*, on the acknowledgment by him and *David Jones*.

The answers, therefore, of *Nicholas S. Jones* and *Mary Brown*, are responsive to the bill, only so far as they relate to that deed, and so far only can they be received as evidence in the cause, and not as they respect the alleged object of the deed of the 30th of April 1807, from *Nicholas S. Jones*, and wife, to *David Jones*, and from *David Jones* back to *Nicholas S. Jones*. With that restriction, grant to them all the effect and operation of an uncontradicted answer, and also, that the matter disclosed is properly the subject of parol evidence, and they only prove, that the deed to *Mary Brown* was without any valuable consideration, and purely voluntary, in secret trust for the use of the wife of *Nicholas S. Jones*, and the children of that marriage, which is clearly fraudulent in law, and void as to the complainant, who was a creditor to a large amount before and at the time the deed was executed, and has done every thing at law necessary to entitle him to the aid of a court of equity.

It is not necessary, as has been supposed, to show that *Nicholas S. Jones* was in debt to the extent of insolvency, at the time of making the deed to *Mary Brown*, to enable the complainant to defeat that deed. But it is enough that he was largely indebted to the complainant; and it no where appears that he had at the time any other property than what is contained in that deed. But if it should be admitted, that the whole of the answers, as well in relation to the alleged object of the deed from *Nicholas S. Jones*

JUNE 1822.

Jones
vs
Slubey

JUNE 1822.

Jones
vs
Slubey

and wife, to *David Jones*, and from *David Jones* back to *Nicholas S. Jones*, as to the deed to *Mary Brown*, ought to be considered as responsive to the bill; yet, though uncontradicted, they could not be taken to establish any thing in bar of the relief prayed, which parol testimony would not be admitted to prove; for it is as evidence only, that they could be received. And as no parol evidence of declarations or intentions, could be admitted to raise a trust, inconsistent, or at variance with the *expressed* intention of a deed, where the facts and circumstances would not, of themselves, by implication or construction of law, be sufficient, on the ground of its contradicting the instrument—so neither can a trust be set up, for the use or benefit of a third person, to defeat a complainant's equity, by an answer alleging declarations or intentions at variance with the expressed intention of a deed.

Therefore, as the facts and circumstances disclosed in this case; that is, that the estate was originally derived to the wife of *Nicholas S. Jones*, from her father, in fee tail, that she united with her husband in making an absolute deed in fee to *David Jones*, that he reconveyed it, by an absolute deed, in fee to *Nicholas S. Jones*, and that *Nicholas S. Jones*, more than twelve months afterwards, conveyed it to *Mary Brown* by an absolute deed in fee, are not of themselves sufficient, by implication of law, to raise a trust for the use of his wife, and her children, by her marriage with him, in the real estate so conveyed to *Mary Brown*; the answers alleging the several deeds to have been made with that *intention*, cannot be taken to raise such a trust, against the *expressed* provisions and intentions of the deeds themselves, and in that way, to sustain the deed to *Mary Brown*, (which otherwise the law would deem fraudulent,) for the purpose of defeating the object of the bill. It is not, as has been contended in argument, like the case of a post-nuptial settlement, by a husband on his wife or children, for a consideration moving from the wife, where the *use* is expressed in the deed of settlement, and not left to be raised by parol evidence.

If the deed to *Mary Brown* had been executed on the same day with that to *David Jones*, by *Nicholas S. Jones* and wife, and was *expressed* to be in trust for the use of his wife, there might be a foundation for presuming, that the deed to *David Jones*, by which the estate tail in her

JUNE 1822.

Jones
vs
Sluby

was destroyed, was the consideration for which it was made. But it is absolute to *Mary Brown*, and was executed more than a year after the date of the deed to *David Jones*; and there is nothing to show that a settlement on the wife or children of *Nicholas S. Jones*, was contemplated by any of the parties, at the time of making either of the deeds, except the allegations in the answers, by which such an *intention* is attempted to be set up.

Nor can it be assimilated, as has been attempted in argument, to the case of a bill for the specific performance of a parol agreement; where if the defendant admits the agreement, without insisting on the statute of frauds, performance will be decreed. There, there is no contradiction of a deed, the admission is beneficial to the complainant, and against the interest of the defendant, who by not insisting on the benefit of the statute, is taken to have renounced it. And it is on the ground of his having waived the benefit of the statute, (which is with himself,) that performance will be decreed; for if in that case the defendant admits the agreement, but insists upon the statute, there can be no decree. But in this case, the complainant has not waived the rule of evidence, that parol testimony cannot be received to contradict a deed. And no parol evidence of *declarations* or *intentions* could be admitted, to raise the trust attempted to be set up by the answers.

This also furnishes a sufficient answer to the suggestion, that the children of Mrs. *Jones* should have been made parties to the proceedings, as no interest is shown in them to be affected by any decree that can be given; and it cannot be permitted to a defendant to delay the bringing of a suit to issue, by merely alleging an interest in a third person.

As to the objection, that the judgment obtained at law by the complainant is for more than is actually due, and that the chancellor ought to have made the proper allowance; &c. it will be seen, on reference to the record, that by the decree, the proceeds of the sale of the property are directed to be brought into the court of chancery, to be applied under the directions of the chancellor; and the chancellor, in his opinion says, that the amount due will be a subject for the report of the auditor, when all credits to which the defendant, *Nicholas S. Jones*, may be entitled, will be allowed him.

DEGREE AFFIRMED.

JUNE 1822.

COURT OF APPEALS, JUNE TERM 1822.

Cox
vs
Scott

Cox's Ex'rs vs. Scott.

A writ of *ne exeat* cannot be granted for a debt founded on a promissory note not due. It can only issue where the demand is an equitable one.

The form of a bond to be executed by the defendant on a writ of *ne exeat* being served on him, set out.

APPEAL from a decree of the court of chancery. The facts stated in the bill which was filed on the 21st of November 1816, are, that *Cox*, the defendant in the court below, (whose executors are now the appellants,) being indebted to the complainants (one of whom is the surviving appellee,) in the sum of \$1599 30, gave them his negotiable promissory note, dated the 23d of April 1816, payable in nine months after date. The note was not due until the 26th of January, after the filing of the bill. That *Cox* was about to remove himself, and all his goods; property and merchandize, into the western parts of the *United States*, and without paying said debt to the complainants; or giving them any security or satisfaction for the payment thereof. That as the promissory note, and the sum of money therein mentioned, was not due, the complainants could not institute a suit at law for its recovery; and for as much as they would be without remedy in the premises; and if *Cox* was to leave this state, would be in danger of losing their said debt, they prayed that he be decreed to pay, or secure to be paid, to them, the said sum of money, and be prohibited from leaving or departing from this state without the further order of this court; and for such other and further relief in the premises, as the nature and justice of their case might require, &c. Prayer for a *subpena*, and the state's writ of *ne exeat*, &c. Writs of *subpena* and *ne exeat* accordingly issued. At the return day of the writs the sheriff, to whom they were directed, returned that he had served them, and that he had taken a bond from *Cox*, with surety to the state in the penal sum of \$3200, conditioned, "that if the said *James Cox, junior*, does not go, or attempt to go out of the state of *Maryland*, without leave of the said high court of chancery, then the above obligation to be void, otherwise to remain in full force and virtue." *Cox* answered the bill, admitting that he was indebted to the complainants in the sum mentioned on his promissory note, as stated by them. He denied that he was about to remove himself and all his goods, &c. into the western parts of the *U. S.* but that being a merchant, extensively engaged in business, and having a large stock of dry goods on hand, &c. he had, with the knowledge

and consent of all his principal creditors, except the complainants, intended to take a part of said stock to *Pittsburgh* for the purpose of disposing of them, and to make collections of debts due him there, and afterwards to return as speedily as possible to *Baltimore*, and had no design whatever of permanently removing, &c. That he had executed a bond, with security, securing the complainants full and complete remedy at law, which he had offered to them, &c. *Prayer*, that the writ of *ne exeat* might be discharged, &c. and petitioned that he might be permitted to depart the state on his lawful and necessary business, &c.

JUNE 1822.

Cox
vs
Scutt

KILTY, Chancellor, (November 29th, 1816.) I have considered the within petition, and the answer and other papers therein referred to. I am opinion, that no temporary leave could be given, but that the writ of *ne exeat* must be discharged entirely, or remain in force. But no circumstances of hardship that could be stated would entitle the petitioner to a decision without giving the other party an opportunity of being heard. Without expressing any positive opinion, I am inclined to think, that if the petition could now be heard, the bond offered would not be sufficient; but that a bond to perform the decree would be required. It is therefore ordered, that the petition be heard on Wednesday the 2d day of December term next; provided a copy of this order be served on either of the complainants, or their counsel, before the 2d of December next. On the 2d of December the chancellor passed the following order: "On hearing the parties on the above petition I am of opinion, that it cannot be complied with, but the *ne exeat* may be dissolved on a bond according to the rule contained in the book of orders." The defendant afterwards executed such a bond to the state, in the penal sum of \$3200, and conditioned, "that if the said *James Cox, junior*, shall either obey, fulfil and perform, the decree which may be made by the chancellor in the said cause, or render his body to the custody of the sheriff, to whom any writ of attachment or *capias ad satisfaciendum* shall be directed, for the purpose of compelling a performance of the said decree by the said defendant, then," &c. The chancellor then ordered the *ne exeat* to be dissolved.

JUNE 1822.

COX
vs
Scott

KILTY, Chancellor, (February term 1817.) This suit being set down for final hearing on bill and answer, was argued by the counsel on each side. On behalf of the defendant a number of authorities were cited as to the jurisdiction and practice of the court; to the benefit of which, as far as they are applicable, his client is entitled; but there are no merits in his case. He applied to have the *ne exeat* dissolved, and it was dissolved according to the rule of the court, on his giving a bond to obey the decree, or render himself to custody on a *ca. sa.* The present defence goes to render the bond nugatory, although the answer admitted the money to be due. The only doubt that I have is as to the kind of decree now to be made. It is not the practice of the chancellor alone to assess interest by way of damages; and therefore it appears proper to have an interlocutory decree to account. But if the complainants should desire it, the decree will be rescinded, and the cause stand for further hearing at the next term. *Decreed*, that the parties account with each other, and that an account be taken by the auditor, &c. The auditor accordingly stated an account—that there was due from the defendant to the complainants the sum of \$1634 11, with interest on \$1599 30 from the 29th of May 1817, until paid.

KILTY, Chancellor, (July term 1817.) The counsel for the complainants moved for a confirmation of the auditor's report, and a decree for payment. The counsel for the defendant was heard against it, and the case was submitted. I see no reason to alter the opinion expressed in the interlocutory decree at February term. *Decreed*, that the account reported by the auditor be confirmed, and that the defendant do forthwith pay to the complainants, or bring into this court to be paid to them, the sum of \$1634 11, with interest on \$1599 30, part thereof, from the 29th of May 1817, until paid or brought in, and the costs of this suit. From which decree the defendant appealed to this court. Pending the appeal, he died, and his executors were made parties. The death of one of the appellees was suggested.

The cause was argued at December term 1819, before CHASE, Ch. J. BUCHANAN, JOHNSON, MARTIN, and DORSEY, J.

Scott, for the appellants, contended, 1. The proper remedy for the complainants for the recovery of their debt, was an action at law on the note, and the court of chancery had not jurisdiction in the case; if that court had not originally jurisdiction, no act of the parties could give it, and every thing must be considered as *coram non judice*.

Cox
vs
Scott

2. Even if the court of chancery would have had jurisdiction, on the complainant's showing that they had been deprived of their remedy at law by the act of the defendant, yet there was no such testimony, and the answer denied the allegation of an intended removal.

On the *first point* he contended, that the writ of *ne exeat* was a high prerogative writ, and was issued by the King for political purposes, to restrain the subject from leaving the country. *Fitz. N. B.* 85, (192.) *Cooper's Plead. Introd.* XXXIV. It was afterwards extended for the benefit of the subject, but was never issued on a mere legal demand, but only in the case of an equitable one. *Anon.* 2 *Atk.* 210. *Read vs. Read*, 1 *Chan. Ca.* 115. *Roberts vs. Wilkie*, *Amb.* 177. *King vs. Smith*, 1 *Dick. Rep.* 82. *Atkinson vs. Bedal*, *Ibid* 98. *Ex parte Duncombe*, *Ibid* 503. *Taylor vs. Leitch*, *Ibid* 380. *Ex parte Bunker*, 3 *P. Wms.* 313. *Goodwin vs. Clarke*, 2 *Dickens' Rep.* 497, (& note.) *Crossley vs. Marriott*, *Ibid* 609. *Brocker vs. Hamilton*, 1 *Dickens' Rep.* 154. 2 *Madd. Chan.* 181, 182, per Lord Chan. *Eldon*. *Cooper's Plead.* 13, 149. *Seymour vs. Hazard*, 1 *Johns. Chan. Rep.* 1. *Cook vs. Ravie*, 6 *Ves.* 283. It had sometimes been granted in the nature of bail. *Cooper's Plead. Introd.* XXXIV, and page 13. 2 *Mad. Chan.* 182. So also when applied for by suréties, as in *Hall vs. Bosley*, by Chan. *Rogers*; and *Wilson & Hoffman vs. Mandhart*, by Chan. *Hanson*. Also by Chan. *Hanson* in the case of partners.

On the *second point* he stated, that if the writ of *ne exeat* had issued properly, there was no subject matter on which the chancellor could decree, as the proper remedy was at law. He cited 1 *Madd. Chan.* 21, 69. *Anon.* 2 *Atk.* 210.

Moale, for the appellee. The question for decision is, hath the court of chancery jurisdiction over the matter contained in the proceedings in this case? If the subject matter is cognizable in equity, then the decree is correct, and is in conformity with the justice of the case, as dis-

JUNE 1822, closed by the proceedings. It appears that an interlocutory decree passed to account, with liberty to the complainants and defendant to produce testimony. An account was taken. This account, and the amount thereof, form the basis of the final decree. The subject matter of the claim may be fairly considered as matter of account; and if so, a court of equity hath competent jurisdiction: 1. In the case of an admitted balance of account, the court has jurisdiction. An admitted balance of account does not differ from a note. Between drawer and payee, the consideration may be inquired into by the drawer, and so into an admitted balance of account. It does not appear but that there were mutual dealings between the parties, and that the note was taken for the balance of account. If the note was for such balance, the court hath original jurisdiction, as in *Jones vs. Sampson*, 8 Ves. 593, where the writ of *ne exeat* was sustained on an admitted balance of account, (upon which bail might have been had,) on the ground that either party might apply to a court of equity and have an account. It was incumbent on the defendant below to show that the claim in question was a *single demand*. He might have proved that *fact* before the auditor, when the account was taken, Mutual dealings, and a balance of account, may be fairly inferred.

2. The decree in this case may be sustained on the ground of fraud. The transaction, on the part of the appellant, originated in fraud. That fraudulent devices were used in obtaining the merchandise on a long credit, and giving the note payable at a distant day, are facts disclosed by the answer. If the fraud grew incidentally out of the whole transaction, it is sufficient to give the court jurisdiction.

3. This writ can be sustained in all cases where the party having *even* a money demand, cannot institute suit at law, and hold the debtor to bail. In such cases a court of chancery has jurisdiction, and can grant relief. The right to recover under the jurisdiction of that court, arises from the act of the debtor himself. His leaving the state with his property, of itself gives jurisdiction. The uniform decisions of the court of chancery of this state have recognized this principle; and in all cases of money demands, where the debtor could not be held to bail at law, the writ of *ne exeat* has been granted and sustained. This

COX
vs
SCOTT

JUNE 1822,

Cox
vs
Scott

was the case in *Zollicoffer vs. Bousquet*, and *Philpot vs. Basey*, in the year 1784. *Hogan vs. M'Culloh*, and *Hall vs. Ogden*, in 1786. *Hall vs. Bosley*, and *Wright vs. Clayland*, in 1788. *Owings vs. Ogden*, in 1795. In this last case the basis of the prayer for the writ was, that *Owings* had instituted an action of trespass *Q. C. F.* and had omitted to file an affidavit to hold the defendant to bail, there being a great and special damage, &c. *Montgomery vs. Gilmor*, where the bond was not due, and *Smith vs. Gordon* in 1799. *Brown vs. Duncan*, by surety for notes not due, in 1800. *Scott vs. Bulger*, where the note was not due, and *Shipley vs. Dougherty*, in 1801. *Lock & Cartwright vs. Bond*, on the application of sureties in a guardian's bond, and *Hoffman et. al. vs. Mandhart*, by sureties in custom house bonds, in 1802. *Whittington vs. Freeland*, where a *ca. sa.* had issued on a judgment, and was returned *non est*, in 1804. These cases prove the practice of the court of chancery in this state to be, that a writ of *ne exeat* may issue, and be sustained, where the party has a *money demand*, (although not a demand where a court of equity would have cognizance, as having either original or concurrent jurisdiction,) and has no remedy at law, and cannot hold the debtor to bail.

The late decisions in *England* show that the writ of *ne exeat* can in no case be sustained but where the court of chancery hath original or concurrent jurisdiction. But this court will not be controlled by those decisions further than is consistent with the sound policy of the commercial interest of the country, and the rules of justice. Those cases decide, that to sustain the writ, the demand must be an *equitable demand*, in the nature of a debt actually due—a debt due in conscience, and where the party has no remedy at law. The first case of a writ of *ne exeat* is in *Lloyd vs. Cardy*, Pre. in Chan 171, in the year 1701, where the plaintiff stated that he had paid the defendant more money than was due on a bill referred to be taxed. On the affidavit of the plaintiff, without a bill being filed, the writ was sustained. The party here had remedy at law. He could have maintained an action of *assumpsit* for the amount over paid. In *Brunker ex parte*, 3 P. Wms. 312, it was held that the writ could not issue without a bill was filed; that it could not issue on a mere money demand for which the defendant might have been holden to bail. Hence, if the

JUNE 1822. party could not be held to bail, the writ could be sustained. That is, if the creditor cannot support his action at law, because the debt was not due, and therefore the party could not be held to bail, the court will interfere. This is the true distinction. There is no case reported where the party cannot be held to bail, that the court of chancery have refused the writ. In the *anonymous* case in 2 *Atk.* 210, there was a verdict and judgment at law, but the plaintiff could not have the benefit of his judgment immediately, and the defendant was about to leave the country. The writ was refused because the plaintiff might hold the party to bail in an action on the judgment. In *Pearne vs. Lisle*, *Amb.* 75, the writ was refused, because the plaintiff had his remedy at law. In *Done's* case, 1 *P. Wms.* 263, (*note*.) it was held, 1st. that a bill must be filed, and 2d. that the writ could not issue on a *mere legal demand*, for which the defendant might be held to bail. In *Rico vs. Gualtier*, 3 *Atk.* 501, the bill stated a *fraud*. In *Atkinson vs. Leonard*, 3 *Bro. Ch. Ca.* 218, the bond was lost, and the writ was sustained, because the court had concurrent jurisdiction, although the demand was a legal one; that is, the obligor could have been held to bail. In *Parker vs. Appleton*, 3 *Bro. Ch. Ca.* 427, the affidavit stated two demands, the 1st. a liquidated claim, and the 2d. another account. The writ was marked for the former only. The plaintiff and defendant were partners in a joint adventure; the court had original jurisdiction; but still, on the liquidated claim, the party might have been held to bail. In *Cock vs. Ravie*, 6 *Ves.* 284, (which is one of the late *English* decisions, opposed to those of our own court of chancery,) the plaintiff had become the defendant's surety in a *bond* not due, and the defendant had promised to indemnify him. The writ was refused—the *demand* must be an *equitable demand*, in the nature of a debt actually due. This is not the case at bar. In the case of a bond not due, it is a legal demand, because the demand attaches immediately; the penalty admits the debt to be due, but by the condition avoids it. The case of a promissory note is not so, there no legal demand attaches until the note is due. In the above case, Lord *Thurlow* cites a case of a bill filed to make the principal in a bond pay the debt. The party was going to *America* on the 1st of June, and the bond would have been due on the 1st of July. The case was

Cox
vs
Scott

strong, yet the writ was refused. *Jackson vs. Petrie*, 10 Ves. 165, was a case of fraud, but only by inference. So in the case before this court, fraud may be inferred. In *Gardiner vs. —*, 15 Ves. 444, the *ne exeat* was applied for to restrain an attorney from going abroad, and to abide the event of an action pending for the recovery of the money mentioned in the bill. The writ was refused; and it was said to be only granted on an equitable demand. Here the suit was depending, and the party being an attorney upon his privilege, could not be held to bail. The party here had selected his remedy—He had brought a suit and it was depending. In *Haffey vs. Haffey*, 14 Ves. 261, which was a case of alimony, an undoubted case of original jurisdiction. But the Lord Chancellor said “this writ hath been considered as in the nature of equitable bail; and under circumstances that would not entitle you to bail at law, you cannot have this writ here.” In *Jones vs. Alephsin*, 16 Ves. 470, the bill stated the demand to be the balance of account. The court said, “it is settled, that although the plaintiff’s swearing to a balance of account, may have bail at law, yet this court holding concurrent jurisdiction on the head of account, the plaintiff may have the writ.” In *Russell vs. Asby*, 5 Ves. 96, the plaintiff was the widow and executrix of a testator, and being entitled under his will to £4000, employed an attorney to get it in, who recovered part of it, £2712, which he paid over to the defendant, a stock trader, to be invested in the funds. The defendant did not invest it, but converted it to his own use, and to avoid payment intended to leave the kingdom. In support of the motion it was contended, that this was an equitable demand upon which the plaintiff could not sue at law. The Lord Chancellor expressed a doubt whether the writ could be sustained, intimating that the defendant might have been held to bail in an action at law. On motion to discharge the writ it was contended that this was a *mere legal demand*, upon which an action at law for money had and received would lay; but the chancellor said the plaintiff would have been *nonsuited* at law, and that the defendant *should account* for the money according to the price the stock bore when the money was put in his hands.

Curia adv. vult.

JUNE 1822.

Cox
vs.
Scott

JUNE 1822. THE COURT OF APPEALS at the present term reversed the decree of the court of chancery.

Dashiell

vs

Attorney General

COURT OF APPEALS, JUNE TERM, 1822.

DASHIELL *et al.* vs. THE ATTORNEY GENERAL.

The peculiar law of charities originated in the statute of charitable uses of 43 Eliz. ch. 4, and independent of that statute a court of chancery cannot sustain and enforce a devise to charitable uses, which, if not to a charity, would on general principles be void.

J. C. by his will directs the income of his estate to be paid over by his executors to certain trustees, and after making several appropriations of a part thereof, further directs the residue to be equally divided, one half to be applied towards feeding, &c. the poor children belonging to the congregation of *Saint Peter's* Protestant Episcopal Church &c. Held, that such bequest is too vague and indefinite to be carried into effect, and is therefore void, and that the subject of the trust results for the benefit of the next of kin of the testator.

A devise to trustees for the benefit of an indefinite object is equally as invalid as an immediate devise to such an object.

The statute of 43 Eliz. ch. 4, is not in force in this state.

Kitty's Report of British Statutes—The authority it is entitled to

APPEAL from *Baltimore* county court sitting as a court of equity. This was an information and bill of complaint filed in the name of the Attorney General, at and by the relation of the trustees of *Hillsborough* school in *Caroline* county, and of the vestry of *Saint Peter's* church in the city of *Baltimore*, and the trustees of *Saint Peter's* school in the said city, on the behalf of themselves and of *Peter Harmar*, &c. poor children belonging to the congregation of *Saint Peter's* Protestant Episcopal Church in the city of *Baltimore*, and of the rest of the poor children belonging to the said congregation, against the Reverend *George Dashiell*, *George W. Dashiell* and *Mary* his wife, to establish certain charitable devises in favour of the relators and complainants, and to enforce the execution of a trust for that purpose in the will of *James Corrie*, dated the 12th of March 1805. The will referred to, after appointing *George* and *John Yates* executors, and the appellant, *George Dashiell*, and *Henry Downes*, trustees of the testator's estate, and guardians of his daughter and only child, and directing the mode in which his estate should be administered, and the proceeds (after payment of his debts,) invested in certain banks by his executors, and be by them paid over to his trustees, contains the following clauses—

"I will that my daughter *Mary* shall have a woman to nurse and attend her; and all the necessary expenses attending my daughter *Mary*, and the expenses of a woman to attend her until she attains the age of eighteen years, shall be paid out of the income of my estate, received by my trustees from my executors, and the residue of the income, after deducting my daughter *Mary*, and her servant's expenses, shall be appropriated, until she attains the above age of eighteen years, as follows: It shall be equally divided, one half to be applied towards feeding, clothing and educating, the poor children belonging to the congregation of *Saint Peter's* protestant episcopal church in the city of *Baltimore*; the other half to be applied towards feeding,

clothing and educating the poor children of *Caroline county*, in the state of *Maryland*, which attends the poor or charity school established at *Hillsborough*, in said county, the trustees of which school are to receive from my trustees the aforesaid appropriation, in payments at every six or twelve months, and appropriate the same in the manner I have now willed; and should my daughter *Mary* die before she becomes eighteen years of age, in such case I will and bequeath the whole income of my estate to be equally divided, one half to be applied towards feeding, clothing and educating, of the poor children belonging to the congregation of *Saint Peter's* Protestant Episcopal Church in the city of *Baltimore*; the other half to be applied as aforesaid for feeding, clothing and educating, the poor children of *Caroline county*, in the state of *Maryland*, which attends the poor or charity school established at *Hillsborough* in said county. I will that should my daughter *Mary*, on her becoming marriageable, connect herself by matrimony to a man of good moral character, and have the consent of one or both of her guardians, or one or both of my executors, to the connexion she forms, that she shall be entitled to receive from my trustees, and they shall pay to her for ever, the one half of the net annual income of my estate; the other remaining one half of the annual income will then be equally divided by my trustees, the one part of which to be applied towards feeding, clothing and educating, of the poor children belonging to the congregation of *Saint Peter's* Protestant Episcopal Church in the city of *Baltimore*, and the other part to the feeding, clothing and educating, the poor children of *Caroline county*, in the state of *Maryland*, which attends the poor or charity school established at *Hillsborough* in said county. But should my daughter *Mary*, on the contrary, marry any man in a clandestine manner, without obtaining the consent of one or both of her guardians, or one or both of my executors, they shall, in such case, withhold from her any benefit from my funds, until they ascertain how far the man she may so marry is worthy of receiving any benefit from my funds arising through her. And should my daughter *Mary* not form any connexion in matrimony after attaining the age of eighteen years, she will be entitled to have the same support, with a servant woman to attend her, as she had until she attained the age of eighteen years, with a further al-

JUNE 1822

Dashiell

Attorney General

JUNE 1822.

Dashiell
vs
Attorney General

lowance of what money her guardians or my executors may consider necessary for her to defray all decent expenses." "I will, that if at any future period any of my relations should require assistance, to be supported, clothed and educated, that my trustees, in virtue of this will, shall give the preference to them; either in the county of *Caroline*, in the state of *Maryland*, or the city of *Baltimore*, in said state, or in any other place; they shall attend to their wants as aforesaid in preference to all others." The will was proved on the 18th of May 1805: On the 25th of January 1806, the trustees of *Saint Peter's* school were legally incorporated. The answers of the defendants insisted, that the relators were not entitled to relief, and that the devise conferred no interest which could be established in their favour, but that the same was void, and a trust only for the next of kin, the testator's daughter *Mary*, one of the defendants. The county court decreed *pro forma*, that the charitable bequests and uses made and created by the will of *James Corrie*, ought to be established, and the trusts thereof performed and carried into execution. That one moiety of the whole estate, &c. should remain vested in the defendant *George Dashiell*, to be by him held and applied for ever thereafter for the benefit of the daughter of the said *Corrie*, now *Mary Dashiell*, wife of the defendant, *George W. Dashiell*, and her legal representatives, as directed by the provisions of the said will. That the other moiety of the whole estate, &c. be divided into two equal moieties, whereof one moiety was to be assigned, &c. by the defendant, *George Dashiell*, surviving trustee under the said will, to *The Trustees of Saint Peter's School* in the city of *Baltimore*, in the manner thereafter mentioned and directed. And as between the relators and the defendant, *George Dashiell*, it was decreed, &c. that the said *George Dashiell* be removed and discharged from the trust under the said will, so far as it related to the said relators, and that *The Trustees of Saint Peter's School*, and their successors, should be substituted and appointed trustees to execute the trusts under and created by the said will, so far as concerned "the poor children belonging to the congregation of *Saint Peter's* Protestant Episcopal Church in the city of *Baltimore*," and that the said *George Dashiell*, surviving trustee as aforesaid, should assign, &c. one moiety of the charity estate, that is to say, one fourth part of the

whole estate, &c. now in his hands as surviving trustee as JUNE 1822
 aforesaid, or to which he had any right or title, as such
 trustee, unto "The Trustees of *Saint Peter's School*," and
 their successors, for ever, in severalty, and not subject to
 the control of any person or body politic whatever, to and
 upon the charitable uses declared by the testator, *James*
Corrie, in favour of "the poor children, belonging to the
 congregation of *Saint Peter's Protestant Episcopal Church*
 in the city of *Baltimore*," and to be by the said trustees of
Saint Peter's school for ever thereafter held and applied
 to the charitable use aforesaid, and none other. From
 which decree the defendants appealed to this court.

Dashiell
 vs
 Attorney General

The cause was argued before BUCHANAN, EARLE, MAR-
 TIN, and STEPHEN, J.

Taney, *Winder*, and *Murray*, for the appellants, contend-
 ed, 1. That the devise in *Corrie's* will, intended for the
 benefit of the relators, was void for uncertainty, and was
 not cured by the statute of 43 *Elizabeth*, ch. 4, for regulat-
 ing charitable uses.

2. That if such devise was within the remedy of that
 statute, the statute was not in force in this state.

3. That said devise was void under the 34th article of
 the declaration of rights of this state.

On the first point they argued, that the relators, the per-
 sons intended to be benefited by the devise, were not, in-
 dependent of the statute, by the general principles of the
 law of devises, designated with sufficient legal certainty.
 They cited *Pow. on Dev.* 276, 277, (418.) 3 *Com. Dig.*
 tit. *Devise*, (K.) 412. *Taylor vs. Sayer*, Cro. Eliz. 742.
Anon. 1 P. Wms. 327. 4 *Bac. Ab.* tit. *Legacies*, 329, 330.
The Baptist Association vs. Hart's Ex'rs, 4 *Wheat.* 29.
 The acts of 1802, ch. 105, and 1803, ch. 45, establishing
 and incorporating *St. Peter's Church* and school. 3 *Com.*
Dig. tit. *Devise*, 410. That the general principle of the
 law of charity was, that all the defects in the form of as-
 surance were cured by the statute of charitable uses, and
 were to be enforced by the court. That the object of the
 statute of 43 *Elizabeth*, ch. 4, was to supply all defects in
 the assurance, and to give effect to every devise or gift to
 charity which would before have been void, and that the doc-
 trine of charitable uses originated from that statute. They
 cited 2 *Fonbl.* tit. *Charities*, s. 2, p. 209, 211. *Duke's*

JUNE 1822. *Charitable Uses*, 371. *The Baptist Association vs. Hart*, 4 *Wheat.* 1, 29. *The Attorney-General vs. Bowyer*, 5 *Ves.* 726. *Morice vs. The Bishop of Durham*, 10 *Ves.* 540. 9 *Ves.* 405, *S. C. Mills vs. Farmer*, 1 *Merivale*, 87. 4 *Wheat.* (appendix,) 5. *Duke*, 355, 356, 359, 360, 362, 366, 368, 370, 379, 385. 2 *Fenbl.* 206. *Dartmouth College vs. Woodward*, 4 *Wheat.* 677. That the chancellor in the province, had not the same powers as the Lord Chancellor had in England. *Snow vs. Gerrard* in the upper house in 1663, That the case of charities did not belong to the court of chancery, exclusively as a court of equity. *Cooper's Plead.* 27, 101, 102. 2 *Fenbl.* 29. *The Baptist Association vs. Hart*, 4 *Wheat.* 37. Unless it was a charity within the statute of *Elizabeth*, there was no power to sue in the name of the Attorney-General, and there could be no relief by information. *The Attorney-General vs. Hewer*, 2 *Vern.* 387. *The Attorney-General vs. Newcombe*, 14 *Ves.* 7. Where the object of the donor is definite, but cannot be effected, the court will not look to another object, but let the property go to the next of kin or the heir at law. 1 *Bac. Ab.* tit. *Charitable Uses*, (D.) 587, (notes.) *The Attorney-General vs. The Bishop of Oxford*, 1 *Bro. Chan. Rep.* 444. So where the testator discovered no general intention beyond that specified in his will, and that was disappointed. *The Attorney-General vs. Goulding*, 2 *Bro. Chan. Rep.* 428. *The Attorney-General vs. The Earl of Winchelsea*, 3 *Bro. Chan. Rep.* 379. So a bequest to the testators most necessitous relations would go according to the statute of distributions. *Widmore vs. Woodroffe*, *Ambl.* 640. *Jones vs. Beall*, 2 *Vern.* 381. That where there is a general intention as to the charity, it might be appropriated to particular charities, but not where there was a particular bequest to a particular object. *De Costa vs. De Pas*, *Ambl.* 228. *Moggbridge vs. Thackwell*, 7 *Ves.* 80. *Mills vs. Farmer*, 1 *Mer.* 55.

On the second point, they referred to the *Declaration of Rights*, art. 3. *The State vs. Buchanan, et al.* (ante 317.) *Killy's Rep. of the Stat.* 87. *Resol.* of 1794, No. 10; 1809, No. 22; 1810, No. 21, and 1816, No. 69. *Whittington vs. Polk*, 1 *Harr. & Johns.* 250. *Rep. of the Stat. in Pennsylv.* 5 *Binny's Rep.* 595. The acts of 1704, ch. 38; 1722, ch. 4, and 1723, ch. 19. *Jackson vs. Hammond*, 2 *Caine's Cases*, 357. Colonists may adopt or reject the laws of the mother country. *Grosius*, B 2, s. 10. *Swift's*

Laws of Con. 40. The doctrine of charity, whether under the statute, or common law, was not a legal, but a prerogative one, and such as could not be authorised under our form of government. *Moggbridge vs. Thackwell*, 1 *Ves. jr.* 464, and 7 *Ves.* 35. 5 *Bac. Ab. tit. Prerogative*, (D. 5.) 534. *Cooper's Plead.* 219. 3 *Blk. Com.* 427. *Higmore on Lunacy*, 28. No appeal lay from the chancellor on a decree for charitable uses under the statute. *Saul vs. Wilson*, 2 *Fern.* 118. The statutes of *mortmain* were expressly introduced as to all the landed property in the province, by the conditions of plantations in 1648. *Kilty's Land Hold. Ass.* 42.

JUNE 1822.
Dashiell
vs.
Attorney General

Harper, and *R. Johnson*, for the appellees, contended,
1. That the bequest was good under the statute of *Elizabeth*; and that that statute was in force in this state. 2. That a devise similar to the present, independent of the statute, might be enforced in chancery. They argued that a devise to charity in general was valid by the statute. So was a devise to the poor generally; and if so, that a devise to the poor of a particular congregation was of course good. If it did not come under the statute, it was because the remedy afforded by the statute was not necessary. The statute of *Elizabeth*, which is set out in *Duke*, 127, repealed the statute of *mortmain*, and was intended to remedy devises of this kind. That it was in force in this state, they referred to the *Decl. of Rights*, art. 3. 1 *Blk. Com.* 107. 2 *P. Wms.* 75. *Blankard vs. Galdy*, 2 *Salk.* 411. *Smith vs. Gould*, *Ibid* 666. *The State vs. Buchanan, et al.* (*ante* 317.) *King vs. Bond*, 4 *Burr.* 2500. 1 *Tucker's Blk. (Appendix,)* 412, 443. Acts of 1704, ch. 38, 1723, ch. 19. An appeal would lie from a decision under the statute for charitable uses. 3 *Blk. Com.* 437.

2. That the bequest could be supported at common law, independent of the statute of *Elizabeth*. They cited *Pow. on Dev.* 428, 421, 422. *Isaac vs. Defriez*, *Ambl.* 595. *Brundsden vs. Woolredge*, *Ibid* 507. 4 *Bac. Ab. tit. Legacies & Devises*, 329, (*notes.*) *Duke*, 360, 361. 4 *Coke*, 109, 111, 115, 116. 1 *Coke*, 22, b. *The Attorney-General vs. Bowyer*, 3 *Ves.* 725. The statute of *Elizabeth* gave effect to some devises which before were invalid; but the greater part of those it embraced could be enforced before, and informations for charitable uses did not grow up under it. *Porter's case*, 1 *Coke*, 22. *Eyre vs. The Countess*

JUNE 1822. *of Shaftsbury*, 2 *P. Wms.* 103, 110. *Falkland vs. Bertie*, 2 *Vern.* 342. *Christ's College, Cambridge*, 1 *W. Blk. Rep.* 91. 3 *Blk. Com.* 427. *Duke*, 108, 163. *Dig. of Chan. Rep.* 40, pl. 2, 12, 13. 2. *Cas. in Chan.* 18. Where the persons to take were capable of being identified, the court of chancery would supply the place of trustees; but here there were trustees sufficiently designated, as were also the *cestui que trusts*. *Brundsen vs. Woolredge*, *Ambl.* 507. *Widmore vs. Woodroffe*, *Ibid* 636. That the right might be enforced in this state under our constitution, they referred to 3 *Blk. Com.* 47, and the *Const. art.* 36.

Dashiell
vs
Attorney General

BUCHANAN, J. delivered the opinion of the court. This case has been ably and elaborately discussed; and on an attentive examination of the numerous authorities referred to, and relied upon in argument by the counsel on either side, we have come to this conclusion: That the peculiar law of charities originated in the statute 43 *Elizabeth*, for regulating charitable uses, and that independent of that statute, a court of chancery cannot, in the exercise of its ordinary jurisdiction, sustain and enforce a bequest to charitable uses, which, if not a charity, would on general principles be void; and in this we are supported by the decision of the Supreme Court of the *United States*, in the case of *The Baptist Association against Hart's Executors*, 4 *Wheaton*, 1, in which all the principal authorities are reviewed, and the subject very fully investigated.

It is an admitted general principle, that a vague bequest, the object of which is indefinite, cannot be established in a court of equity.

Is this a bequest of that description? We think it clearly is. The testator, by his will, appointed the appellant, *George Dashiell*, and *Henry Downs*, trustees of his estate, and guardians of his only child, with instructions to his executors to pay over to them the annual income of his estate, to be by them appropriated according to the provisions of the will, which, after providing among other things, for the payment of his debts, and the support and education of his daughter, directs the residue of the income of his estate "to be equally divided, one half to be applied towards feeding, clothing and educating, the poor children belonging to the congregation of *Saint Peter's Protestant Episcopal Church* in the city of *Baltimore*," &c. with cer-

tain provisions for the eventual increase or decrease of the fund so set apart for that purpose. JUNE 1822.

Wherever the word *poor* or *poorest*, has been used as a term of description in a devise or bequest, it has been held to be insufficient, for uncertainty; as a devise to twenty of the poorest of the testator's kindred. *Powel on Devises*, 419. 3 *Com. Dig.* 412, with many other authorities, to which it is unnecessary to refer. In this case the bequest is quite as vague and indefinite as if it was to twenty of the testator's poorest relations, or to his poor relations generally, or to the poor people of a particular county.

Dashiell
vs
Attorney General

Who are "the poor children belonging to the congregation of *Saint Peter's Protestant Episcopal Church* in the city of *Baltimore*?" No court can know, or have the means of ascertaining; and the description of the *cestui que trust* is so vague, that none can be found who, upon the general principles of equity, can entitle themselves to the benefit of the trust.

It seems to be supposed, that the power of ascertaining and designating "the poor children belonging to the congregation of *Saint Peter's Church*," is given by the will to the trustees, and that the beneficial interest of the *cestui que trust* may be sustained by reason of the intervention of trustees capable of taking the legal estate, on the principle that *id certum est quod certum reddi potest*.

If it be admitted that authority is vested by the will in the trustees to ascertain and designate who are the poor children belonging to the congregation of *Saint Peter's Church*, it cannot, abstracted from the statute, assist the case of the defendants, for being a personal trust, without the aid of the statute, the *cestui que trust* can only be brought into being by the ascertainment and designation of the trustees; and there being no such *ascertainment* and *designation*, though certain *selections* have been made, no persons exist having in themselves a vested equitable interest which they are capable of asserting in a court of equity. The bequest therefore is too vague and indefinite to be carried into execution on general principles, there being none who can show themselves entitled to the beneficial interest, but is void, and the subject of the trust being undisposed of, the benefit of it results to the next of kin, as in the case of *Morrice vs. The Bishop of Durham*,

JUNE 1822.

Dashiell
vs
Attorney General

9 Ves. 399; where the devise was to the Bishop, in trust "to dispose of the ultimate residue to such objects of benevolence and liberality as he in his own discretion should most approve of," which being held not to be a charity, the bequest was determined to be void, and the residue decreed to the next of kin; on the ground that it was too indefinite to be executed by the court, which, as the master of the rolls said, "had not been and could not be denied." And if it were otherwise, the trustees, by neglecting to execute the trust, might virtually convert the trust into the ownership of the trust fund. If there was here a discretion vested in the trustees appointed by the testator, that case would precisely fit this, there being no legal distinction in this state between a bequest to charitable and other objects. But no such power is given; the trustees are directed to appropriate the fund entrusted to them, to the feeding; clothing and educating, the poor children belonging to the congregation; &c. that is, all the poor children belonging to that congregation, not such as they might select, and without any right or power to discriminate; and there is no difference whether a devise or bequest be immediate to an indefinite object, or to a trustee for the use and benefit of an indefinite object. If it be immediate to an indefinite object, it is void, and if it be a trust for an indefinite object, the property that is the subject of the trust, is not disposed of, and the trust results for the benefit of those to whom the law gives the property in the absence of any other disposition of it by the testator or donor; and independent of the statute of *Elizabeth*, no court in this state can by any mode carry such a devise or bequest into effect in violation of vested individual rights. It would be to make and not expound and enforce wills; an arbitrary exertion of judicial power altogether inconsistent with any principle known to the institutions of the state. And it is believed that in *England*, before the statute of *Elizabeth*, no charity could have been established on information in the name of the Attorney General, where the instrument creating it was defective, or the object of the donor's or testator's bounty was so vaguely and imperfectly described as to be incapable of taking if it was not a charity, and the thing intended to be given would vest in the heir at law or next of kin; but that whenever

Charities were established on such informations, they were such as were valid in law, and the enforcement of which did not interfere with vested private rights. It is also, in this case, a fatal objection to the validity of the devise, that it is not for the benefit of those poor children alone, who at the time belonged to the congregation of *Saint Peter's Church*, but of the poor children who should in *succession* belong to that congregation, and who not being a corporate body were incapable of taking in succession. A devise or bequest immediately to an object incapable of taking, or in *trust* for such an object, standing on no better footing than if it were to a vague and indefinite object, and "The Trustees of *Saint Peter's Church*," and "The Trustees of *Saint Peter's School*," and "The Trustees of *Hillsborough School*, in *Caroline county*," have clearly neither of them either a vested right in themselves, nor any beneficial interest in the trust.

JUNE 1822.

Dashell
vs
Attorney General

The next and principal question is, whether the statute 43 *Elizabeth* is in force in this state? which we think depends entirely on the construction to be given to the *third* section of the bill of rights, and the evidence furnished by Chancellor *Kilty's* Report of the Statutes. The *third* section of the bill of rights is in these words: "The inhabitants of *Maryland* are entitled to the common law of *England*, and the trial by jury, according to the course of that law, and to the benefit of such of the *English* statutes as existed at the time of their first emigration, and which by experience have been found applicable to their local and other circumstances, and of such others as have been since made in *England* or *Great Britain*, and have been introduced, used, and practised by the courts of law or equity." The provisions of this article vary according to the different subjects to which they relate.

The inhabitants of the state are declared to be entitled to the common law, without any restrictive words being used, and thus the common law is adopted in mass, so far at least as it is not inconsistent with the principles of that instrument, and the nature of our political institutions.

They are declared to be entitled to the benefit of such of the *English* statutes as existed at the time of their first emigration, and which, by *experience* had, at the time of the declaration of rights, *been found* to be applicable to their local and other circumstances, and also to the benefit

JUNE 1822.
 {
 Dashiell
 vs
 Attorney General

of such other *British* statutes, made after the emigration, as had been introduced, used, and practised by the courts of law or equity—a distinction being made between the statutes which existed before the emigration, and those which were afterwards passed, and between both and the common law. We do not think that this section of the bill of rights is to be expounded according to the rule of construction applicable to declaratory laws, but that it must be understood as adopting the different classes of the statutes to which it relates *sub modo* only, and rejecting all others; and as laying down rules by which to ascertain what statutes were so adopted—a different rule applying to each class. In relation to those which existed at the time of the emigration, their having been found by experience to be applicable to our local and other circumstances, being the rule for the government of courts of justice in determining which are in force; and their having been introduced, used, and practised by the courts of law or equity, the rule in relation to those passed since the emigration. As to the latter class, it does not seem to be denied that none are in force but such as had, at the time of the declaration of rights, been introduced, used, and practised by the courts of law or equity; and if that rule was intended to be restrictive, it is difficult to ascribe to the convention a different intention in relation to the other, nor can a different intention be raised by the argument that our ancestors brought with them all the laws of the mother country at the time of their emigration. For if it had been intended that all the statutes, then existing, should be and continue in force, which *might* by courts be deemed applicable to our local and other circumstances, it was exceedingly idle to declare such of them to be in force as had by *experience* been *found* applicable. And why was a different language adopted in relation to them from that which was used in relation to the common law? for they were both equally brought with them by our ancestors.

The circumstance of a different provision being made shows that the convention entertained different views with respect to them.

It could not have been intended as a mere declaratory provision for the purpose only of removing doubts that existed at the time, for if there were any statutes about the extension of which no doubts were entertained, it must

have been those which, by experience, had been found applicable, and there was no necessity for declaring the inhabitants of the state to be entitled to their benefit, unless it was the intention to prohibit the use of all such as had not by experience been found applicable.

JUNE 1822.

Kennedy
vs
Boggs

This view of the *third* section of the bill of rights raises the question, Which of the statutes existing at the time of the first emigration had by experience been found applicable? The only evidence to be found on that subject is furnished by *Kilty's* Report of the Statutes, in which the 43 of *Elizabeth* is classed among those which are said not to have been found applicable. That book was compiled, printed, and distributed, under the sanction of the state, for the use of its officers, and is a safe guide in exploring an otherwise very dubious path.

It is therefore our opinion, that the statute 43 *Elizabeth*, is not in force in this state, and that the decree ought to be reversed.

DECREE REVERSED.

COURT OF APPEALS, JUNE TERM, 1822.

KENNEDY vs. BOGGS.

APPEAL from *Baltimore* county court. This was an action of *trover* brought on the 10th of March 1818 by the appellant, as provisional trustee of *F. A. Abbott*, an insolvent debtor, against the appellee, for two promissory notes. The general issue was pleaded; and at the trial the plaintiff gave in evidence, that the said *Abbott*, on the

There is no adequate provision in the general insolvent laws of this state, for disposing an insolvent debtor of his property, from the time of his application for relief.

A provisional trustee, appointed under the act of 1816, c. 221, s. 2,

is to take possession of the insolvent's property; but no power is given him to recover such property from third persons; where that is to be done, (there being no permanent trustee,) the name of the insolvent must be used.

The possession only, passes to the provisional trustee, and the absolute property remains with the insolvent until a permanent trustee is appointed, in whom, by operation of the insolvent acts, the title of the property vests.

The provisional trustee has only power to possess and preserve the insolvent's property for the benefit of his creditors; and for the protection of that right he may sue if his possession is invaded.

To avoid a deed or assignment by an insolvent debtor, it must be made with a view and under the expectation of becoming an insolvent debtor, and with an intent thereby to give an undue and improper preference. *See Chase, Ch. J.*

The time when a person becomes an insolvent debtor, under the insolvent laws, is when he files his petition for the benefit of those laws. *Ibid.*

An assignment made by an insolvent through coercion of the law, is not an undue and improper preference. *Ibid.*

Before a final release can be obtained by an insolvent, the trustee must certify to the court that he has received all the property contained in the insolvent's schedule. *Ibid.*

Where there is no final discharge the petition of the insolvent, and all the proceedings under it, are ineffectual and void, and the property will be divested out of the trustee, and revert to the petitioner, and vest in him by operation of law, as a resulting trust, (the original object of the trust having failed;) and will be liable to be operated on and affected under the general laws as the property of the petitioner. *Ibid.*

JUNE 1822. 29th of November 1817, sold to *W. Bromwell* all his goods and stock of merchandize, for about the sum of \$3000, to be paid \$500 in cash, and the residue in notes endorsed by *Hosea Johns*; and that the notes which this action is brought to recover, were two of the notes so given. On or about the first of December 1817, a few days after *Abbott* closed his store, he delivered to *D. Bosley*, of the house of *Bosley and Jarrett*, all the notes drawn by *Bromwell*, with instructions to pay himself the amount due to the firm of *Bosley and Jarrett*, (which was admitted to have been about \$447,) and to hold the rest subject to his, *Abbott's*, order. On the 4th of December following, on the petition of the defendant, (now appellee,) a writ of *ne exeat* issued against *Abbott* from *Baltimore* county court, on an allegation that he was indebted to the defendant, and his copartner, *D. Leche*, in a sum of money equal to the amount of the notes for which this action was instituted. *Abbott* was taken on said writ on the fifth day of the month, and called with the sheriff's officer, and in company with the defendant, on *Bosley*, and directed him to deliver to the defendant the notes in question, which was accordingly done. On the same day, but after his release from the writ of *ne exeat*, *Abbott* was committed to prison at the suit of *Mary Butler*, for a claim of \$47 50, and remained in prison until the 19th of December 1817, when he applied to the chief judge of *Baltimore* county court for the benefit of the insolvent laws of this state, the proceedings under which application were offered in evidence by the plaintiff. By these proceedings it appeared that his application was referred to the commissioners of insolvent debtors for the city and county of *Baltimore*, and proceedings had thereon according to the act of assembly "relating to insolvent debtors in the city and county of *Baltimore*." On the 19th of December 1817, he received his personal discharge as an insolvent debtor, and at the same time the plaintiff was appointed his provisional trustee. The 7th of January 1818 was appointed by the commissioners for *Abbott's* appearance before them; and on the 16th of April 1818, he was finally released under his said application. The plaintiff further gave in evidence, that *Abbott* had no other visible property than the stock of goods assigned as aforesaid to *Bromwell*, and that no other property was returned in his sche-

Kennedy
vs
Boggs

dule. At the time when the said notes were delivered to the defendant, the debts of *Abbott* far exceeded the amount of his property. The defendant then gave in evidence, that the writ of *ne exeat* was issued to prevent *Abbott* from leaving this state, he being *bona fide* indebted to the defendant in the sum of \$878 08, upon two notes, both dated on the 30th of September 1817, and drawn one at four months and the other at ninety days, and that the two notes in the declaration mentioned were delivered over to the defendant in discharge of said debt, and were so delivered in consequence of *Abbott's* arrest under the writ of *ne exeat*, and while *Abbott* was in the custody of the sheriff in virtue of that arrest. On this evidence the plaintiff prayed the court to direct the jury, that if they believed that the notes in controversy were delivered to the defendant by *Abbott* with a view or under an expectation of being or becoming an insolvent debtor, that then the plaintiff was entitled to recover. Which direction the court, [*Dorsey*, Ch. J. *Hanson* and *Ward*, A. J.] refused to give. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

Kennedy
vs
Boggs

The cause was argued before CHASE, Ch. J. EARLE and STEPHEN, J.

Murray, *Kennedy* and *Mayer*, for the appellant. 1. The transfer of the notes to the defendant by *Abbott*, was void, as an undue transfer to a creditor within the meaning of the insolvent laws of this state. 2. The plaintiff was competent to institute this action. On the *first point* they referred to the acts of assembly of 1804, ch. 110; 1805, ch. 110, s. 9; 1807, ch. 55; 1812, ch. 77, and 1816, ch. 221, s. 6. To show that every contract against law was void, although the act declaring it void also inflicted a penalty, they cited *Bartlett vs. Vinor*, *Carthew*, 252. *Devon vs. Watts*, Dougl. 89, (note.) *Mitchell vs. Smith*, 1 Binny's Rep. 110. As soon as a debtor has it in view of becoming insolvent, all his property belongs to his creditors, and he can make no preference. His power of alienation is gone. *Doe vs. Galliers*, 2 T. R. 133. *Touteng vs. Hubbard*, 3 Bos. & Pull. 291. *Butler vs. Rhodes*, 1 Esp. Rep. 236. *Newton vs. Chantler*, 7 East, 143. 1 Com. Cont. 257. 1 Bac. Ab. tit. Bankrupt, 359. *Manro vs. Gittings & Smith*, 1 Harr. & Johns. 497. The doctrine of

JUNE 1822. threat of legal process, &c. grew up under the bankrupt laws of *England*, and is not applicable to our insolvent laws. There fraud annulled the transfer; here it might be improper against the policy of the law, and yet not fraudulent. *Small vs. Oudley*, 2 P. Wms. 429. *Rust et al. vs. Cooper*, 2 Cowp. 629. *Harman vs. Fishar*, 1 Cowp. 117. As the debt was not due, the writ of *ne exeat* could not be supported. *Cox vs. Scott*, ante 384. On the second point they referred to the acts of 1816, ch. 221, and 1820, ch. 182. 3 Bac. Ab. tit. *Executors and Administrators*, (B. 2.) 14, and *Co. Litt.* 52, b.

Kennedy
vs
Boggs

Williams for the appellee. 1. By the provisions of the insolvent laws, a provisional trustee cannot sue in his own name—1st. Because he is only temporarily appointed, and a mere *depository* of the estate and effects of the applicant; and 2d. He is not specially authorised by the statute which creates him, and by which alone he was recognised. He referred to the act of 1816, ch. 221, s. 2, and 1 Bac. Ab. tit. *Bankrupt*, (D.) 40.

2. The powers and duties of the provisional trustee are presumed to have ceased before this action was brought; they were superseded by the appointment of a permanent trustee; and if the same person was appointed permanent trustee, who had acted as provisional trustee, still this does not enable him to sue as provisional trustee—1st. Because he has declared as a provisional trustee; and 2d. Because he has never entered into a bond as permanent trustee. He referred to the acts of 1805, ch. 110, s. 2, 4, 8, and 1816, ch. 221, s. 2, 3, 6.

3. The transfer of the notes to *Boggs* by *Abbott* was not an *undue and improper preference*, within the meaning of the insolvent laws. To render it so it was necessary that the transfer should be shown to be made both “with a view or under an expectation of being or becoming an insolvent debtor,” and also “with an intent thereby to give an undue and improper preference to the creditor.” He referred to the acts of 1805, ch. 110, s. 9; 1807 ch. 55; and contended that the act of 1812, ch. 77, was superseded by the act of 1816, ch. 221, and repealed a part of the 9th section of the act of 1805, ch. 110; and that there was no penalty attached to a preference under the act of 1816, ch. 221. The legislative construction given by the act of 1807, ch. 55, of that of 1805, ch. 110, s. 9. has no

bearing on the act of 1816, *ch. 221, s. 6*, and the construction of the 6th section of that act is to be determined by reference to the principles of the common law, or to cases analogous to it.

JUNE 1822

Kennedy
v.
Duggs

4. The provisions of the act of 1816, *ch. 221, s. 6*, are closely analogous, if not exactly similar to the provisions or constructions under the *English* bankrupt laws, as to voluntary preferences. He cited *Paul's Dig. 78. 1 Bac. Ab. tit. Bankrupt, (F.) 436*. Conveyances are rendered void which are affected by these ingredients, 1st. That they are made voluntarily. 2d. That they are made with an expectation, or in contemplation of bankruptcy, and thereby to give a preference. Whenever there is the absence of either of these circumstances in point of fact, the common law principle, which justifies a *bona fide* creditor in obtaining payment of his just debt, prevails and protected him. *Alderson vs. Temple, 4 Burr. 2335. Harman vs. Fishar, 1 Cowp. 117. 123. Rust et al. vs. Cooper, 2 Cowp. 629. Thompson vs. Freeman, 1 T. R. 155, 156, (note.) Smith vs. Payne, 6 T. R. 152. Hartshorn vs. Slodden, 2 Bos. & Pull. 582. Dixon vs. Baldwin, 5 East, 178. Thornton vs. Hargreaves, 7 East, 544. Small vs. Oudley, 2 P. Wms. 427. Wheelwright vs. Jackson, 5 Taunt. 109. Singleton vs. Butler, 2 Bos. & Pull. 283. Ogden & Thomas vs. Jackson, 1 Johns. Rep. 370. M'Menony vs. Ferrers, 3 Johns. Rep. 71. Lochc vs. Winning, 3 Mass. Rep. 325. Phoenix vs. Ingraham's assignees, 5 Johns. Rep. 412. M'Mechen's Lessee vs. Thornburgh & Grundy, in this court December 1810. To render a payment or a transfer over from one in insolvent circumstances, to a *bona fide* creditor, the act done must be, 1st. wholly voluntary and unsolicited, and 2d. under an expectation of bankruptcy or insolvency, and to give an undue preference—The *quo animo* of both must be considered. He cited *Thompson vs. Freeman, 1 T. R. 156*, and *Hartshorn vs. Slodden, 2 Bos. & Pull. 585*.*

EARLE, J. delivered the opinion of the court. It has been a complaint against the general insolvent laws of this state, ever since the year 1805, that no adequate provision was made for dispossessing the insolvent of his property, from the time of his application for relief. This provision is not supplied, as has been mistakenly supposed, by the act of 1808, *ch. 71, sect. 3*. There must be a petition de-

JUNE 1822.

Kennedy
vs
Boggs

pending, according the terms of this section, before the court, or even the judge, can go into the appointment of a trustee; and by far the greater part of the applications for relief are made by persons, actually imprisoned during the recess of the county courts. This inconvenience, it appears to have been one of the objects of the act of 1816, *ch. 221, sect. 2*, to remove, in the city and county of *Baltimore*.

By this law a provisional trustee is for the first time mentioned, and to the act we must look for a description of his powers. By the words and terms of it; this trustee is to take possession, for the benefit of the creditors of the insolvent, applying to the judges for relief, "of all property, estate, and effects, books, papers, accounts, bonds, notes and evidences of debts," and until he is possessed of them, and the trustee's possession is reported by the commissioners to the judge, the insolvent cannot obtain even a personal discharge from imprisonment. The provisional trustee is thus to receive all the property, &c. of the insolvent, of which he is possessed, and mention is no where made in the law, of a power in him to wrest the property, &c. of the insolvent, out of the hands of third persons. Where this is to be done, and no further trustee has been appointed, the court think the name of the insolvent must be used for the purpose. The possession only passes to the provisional trustee, and the absolute property remains with the insolvent until a permanent trustee is appointed, in whom, by the operation of the acts, the title to the property vests. It does not vest at all, according to our ideas, in the provisional trustee, and therefore he can sustain no suit, which involves the right of property. The action brought on this occasion is an action of trover, and to maintain it, the plaintiff must have a general or special property in the chattel contended for. If a general property, the legal possession follows it, and need not be shown, but if a special property is relied on, the plaintiff must prove the actual possession of the article converted by the defendant to his use. The last, the special property, is not here pretended, and the first, the general property, we have said, remains with the insolvent.

Neither is the power to possess himself by suit against third persons, of the insolvent's effects, incidental, in the

opinion of the court, to the office of this trustee, nor does it grow out of the nature of his trust. JUNE 1822.

Kennedy
vs
Boggs

The trust is to continue, it is admitted, until a permanent trustee is chosen, which the act contemplates to be done, and which ought to be done, in a short time after the application of the insolvent for the benefit of the law, but while it continues, it is a power only to possess and preserve for the benefit of the creditors.

For the protection of these rights, he may sue, if his possession is invaded, but his action would be grounded on his possession, derived from the insolvent, and on his special property consequent thereon, and may be prosecuted by him, without naming himself trustee. Very different is the action brought on this occasion. It must be supported on the general property of the plaintiff, which is always followed up by the legal possession, and agreeably to the opinion of the court already expressed, it is not in this case in the provisional trustee, or the plaintiff, who was only appointed provisional trustee. In this it is unlike the cause of the administrator *durante minoritate*. The title of the property of the intestate vests in him, and he may bring suits in relation thereto, or may be sued, as the intestate himself could have been, although his office is continued for a limited time only.

But if it was conceded, that the provisional trustee had power to sue third persons generally, for the purpose of possessing himself of the property of the insolvent, we should nevertheless think the action in this case could not be maintained. It is a suit against a creditor of the insolvent, to recover damages for the wrongful conversion of certain promissory notes, which, it is admitted, were delivered by the insolvent himself, before his actual insolvency, to the defendant, to discharge a just debt due to him. Where a transfer of this kind is vacated, the property vests in the permanent trustee alone, by the act of 1816, *ch.* 221, sect. 6, and he alone can maintain a suit for it. Whatever then may be the power of the provisional trustee, over the property in the schedule of the insolvent, and this we have attempted to define, we can have no doubt, he is unable to sue for property which has been transferred to a creditor, as these promissory notes have been.

JUNE 1822.

Kennedy
vs
Boggs

Many other points were pressed by counsel in the argument of this case, upon which the court do not deem it necessary to express an opinion. We will, however, further barely state, that in our judgment, the question involving the invalidity of the assignment of the notes by *Abbot* to *Boggs*, cannot be regularly examined, until a permanent trustee is appointed, as he alone can assert the rights of the creditors of the insolvent in this particular. We venture no opinion as to the character of this transaction, but if this assignment is to be considered null and void, it is to be vacated only for the purpose of vesting the property in the permanent trustee, to be distributed among all the creditors of the insolvent; and this cannot be done, where no such trustee has been appointed.

The court below assigned no reasons for the opinion they gave, and we know not what views they took of this subject. We believe, however, they had ample ground to refuse the instruction to the jury prayed for by the plaintiff, and we therefore affirm their judgment.

CHASE, Ch. J. The facts stated in this case on which the prayer to the court below was founded, were not legally sufficient to warrant the court in giving the direction prayed, and the court did right in refusing to give the direction.

The prayer is; that the court should direct the jury that if they believed the above mentioned notes were delivered to the defendant by *Abbot* with a view or under an expectation of being or becoming an insolvent debtor, that the plaintiff was entitled to recover.

The material fact in the case is, that on the 5th of December 1817, while under arrest and in the custody of the sheriff on the *ne exeat*, *Abbot* directed *Bosley* to deliver to the defendant, in discharge of the debt due to him, the two promissory notes for which this suit is brought. On the 29th of November 1817, *Abbot* had sold all his goods and stock in trade, and had given a preference to *Bosley* and *Jarrett*, by depositing the promissory notes with them to pay themselves, and apply the residue as *Abbot* should direct.

The payment to the defendant was not a voluntary payment, but was made under the constraint and coercion of the law, and against the will of *Abbot*. The

cause of the *ne exeat* was the preference *Abbot* had given JUNE 1822.
to *Bosley* and *Jarrett* in the preceding November, and *Ab-*
bot's unwillingness to pay or secure the debt due to the
defendant

Kennedy
vs
Boggs

So far from *Abbot's* manifesting an intention to give an undue preference to the defendant, he evinced a strong desire to prevent his being paid, and was compelled to deliver the promissory notes by the proceeding under the *ne exeat*.

The prayer is defective in not having inserted the words "and with intent thereby to give an undue and improper preference." To avoid the deed or assignment it must be made with the view and under the expectation of becoming an insolvent debtor, and with an intent thereby to give an undue and improper preference. There must be the concurrence of both circumstances to render the deed null and void, and the jury must so find.

On the 19th of December 1817, *Abbot* applied for the benefit of the insolvent laws. When does a person become an insolvent debtor under the insolvent law? I know no criterion by which it can be so well and certainly ascertained as the time of filing his petition. It is then he acknowledges his inability to pay his debts, and applies for relief.

The assignment was made 13 or 14 days prior to the time of *Abbot's* filing his petition, and when made it was not a voluntary but a compulsive act, produced by the coercion of the law, which precludes the circumstances of undue and improper preference.

It is stated in the case, that on the 16th of April 1818, *Abbot* was finally released, and that on the 10th of March 1818, this suit was instituted. This suit was brought before the final release was obtained.

Before a final release or discharge can be obtained, the trustee must certify to the court that he has received all the property contained in the schedule belonging to the insolvent debtor. No such certificate appears in this case.

If there was no final discharge, which was admitted in argument, (indeed there could not be without the certificate of the trustee that he had received all the property specified in the schedule,) then the petition of the insolvent debtor, and all the proceedings under it, became ineffectual and a nullity, and the property will be divested out

JUNE 1822. of the trustee, and revert to the insolvent debtor, and vest in him by operation of law as a resulting trust, the original object of the trust having failed, and the property will be liable to be operated on and affected under the general laws as the property of the insolvent debtor.

Garrell
vs
Hanna

I am of opinion that the judgment of the court below be affirmed.

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1822.

GARRELL vs. HANNA.

Where G. and H. are joint and equal owners of a vessel, and H. has her insured in his own name to amount of \$1500, rating her value at \$2500, the policy does not cover the interest of G. nor can he recover any part of the insurance from H. on his H's receiving it from the insurers.

The construction of written evidence is with the court and not the jury.

APPEAL from *Baltimore* county court. *Assumpsit* for money had and received, brought by the appellant, (the plaintiff in the court below,) against the appellee. The general issue was pleaded. At the trial below, it appeared in evidence that the plaintiff and the defendant were joint and equal owners of the schooner *Mary*, and that she sailed from *Baltimore* to *Washington*, in *North Carolina*, on the 8th of August 1816. On the 20th of August 1816, the defendant sent to *The Union Insurance Office of Maryland* the following order for insurance, viz. "Insurance is wanted to amount of \$1500 on the schooner *Mary*, *James Garrell*, master, valued at \$2500, from *Baltimore* to *Washington*, N. C. against all risks. The *Mary* is 126 tons burthen, light, staunch and strong, draws about 8 feet water; and the master, who is part owner, is sober, industrious and attentive. She sailed on the 8th instant. *Baltimore*, Aug. 20. 1816. *John Hanna*." This order was accepted by the company at one and half per cent. and a policy of insurance was thereupon executed in the name of *John Hanna*, and "as well in his own name, as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain, in part or in whole, lost or not lost, at and from," &c. this being the usual form of all insurances effected at that office. "The *Mary* was lost by one of the perils insured against, and the whole of the insurance, viz. \$1500, was received by the defendant. On these facts the court below, [*Dorsey Ch. J.* and *Ward A. J.*] on the prayer

of the defendant, directed the jury, that the plaintiff was not entitled to recover. The plaintiff excepted and appealed.

JUNE 1822.
Garrell
vs
Hanna

The cause was argued in this court before CHASE, Ch. J. BUCHANAN, EARLE, MARTIN, and STEPHEN, J.

Raymond, for the appellant, stated the question to be, Whether or not the defendant made the insurance as well for himself as for the plaintiff? That the words of the policy included the interest of both. He contended, 1. That where one of two joint owners did an act in relation to their property, it was for the benefit of both; and 2. That the court below should have left the evidence to the jury. On the *first point* he cited *Lawrence vs. Sebor*, 2 *Caine's Rep.* 203.

On the *second point* he cited *Cocksedge vs. Fanshaw*, 1 *Dougl.* 119. *Gibson and Johnson, vs. Hunter*, 2 *H. Blk. Rep.* 205. *Macbeath vs. Haldimand*, 1 *T. R.* 182, per *Bulwer, J.*

R. Johnson, for the appellee, contended, 1 That the order and the policy of insurance were the only evidence in the cause, and there was nothing in either to show that the insurance was effected for the benefit of both; that the rule laid down for the construction of such evidence was settled by this court in *Ferris vs. Walsh*, *ante* 306.

2. That there was no reason why the insurance should be for the benefit of both; they were joint owners of the vessel, but not of the cargo. That there could be no insurance for a part owner without his particular direction. *French vs. Backhouse*, 5 *Burr.* 2727, 2729.

3. That if this was a partnership transaction the action could not be sustained, there being no liquidated balance. *Heath vs. Hubbard*, 4 *East*, 109.

Raymond, in reply, insisted that the action might be maintained, although they were partners. That where the sum could be ascertained, one partner might sue another. But he contended, that joint owners of a ship were not partners; that they were tenants in common. 2 *Esp. Dig.* 198. *Wilson vs. Read*, 3 *Johns. Rep.* 175.

JUDGMENT AFFIRMED.

JUNE 1822.

COURT OF APPEALS, JUNE TERM, 1822.

Fenwick
vs
Forrest

FENWICK vs. FORREST.

In an action of covenant where D. warrant, and defends certain slaves sold to F. against all persons whatsoever, to be the property of F. the breach assigned in the declaration was, that the slaves, at the time of the sale, were not the property of D. but of S. who dispossessed F. of them by a writ of replevin issued against D. and that D. did not warrant and defend the slaves to F. There was no proof offered of the title of S. except the service of the writ of replevin, and its return to court. Held, that F. was bound not only to state specially, dispossession of the slaves, but if it was by a stranger, he must also state a better or paramount legal title to them in such stranger and support it by proof, and that the mere service of the writ of replevin, without any thing further having been done therein, was no evidence of the right or title of S. to the slaves replevied. If S. had made good his claim to the slaves replevied, the judgment would have afforded the best, but not the only evidence to which F. could resort, to prove that S. had a better title to them than D. Any other evidence, written or oral, evincing the fact, might have been used.

APPEAL from *Saint-Mary's* county court. This was an action of covenant. The declaration stated, that by an indenture of writing, entered into on the 22d of July 1817, between the defendant, (now appellant,) and the plaintiff, (the appellee,) the defendant did, in consideration of the sum of \$750 to him paid by the plaintiff, bargain and sell unto the plaintiff sundry negroes, to wit, negroes *George, Grace, Joseph and Eliza*, and did thereby warrant and defend said negroes to the plaintiff against all persons whatsoever, to be slaves for life, and the property of the plaintiff, his heirs, &c. and although the plaintiff did every thing on his part to be done, and paid the defendant the said sum of \$750, yet protesting, that the defendant hath not done and performed all and every thing on his part to be done and performed, according to the intention and effect of the said indenture of writing, the plaintiff in fact saith, that the said negroes were not the property of the defendant at the time of the sale thereof, to wit, at *Saint-Mary's* county aforesaid, but of a certain *David Sommerville*; and further, that the defendant did not warrant and defend said negroes to the plaintiff, as bound by the said indenture to do; but the same hath been since replevied and taken out of the possession of the plaintiff by virtue of a writ of replevin issued from *Baltimore* county court, against the defendant, by a certain *David Sommerville*, to wit, at *Saint-Mary's* county aforesaid, and contrary to the intention, tenor and effect, of the said indenture of writing as aforesaid. Wherefore the plaintiff saith, that the defendant, (although often requested so to do,) hath not kept with the plaintiff the covenant by him made as aforesaid, but to keep the same hath hitherto wholly refused, &c. The defendant pleaded that he had not broken the covenants in the declaration mentioned, or either of them, &c. Upon which plea issue was joined.

At the trial, the plaintiff offered in evidence an indenture, admitted to have been executed by the defendant to the plaintiff on the 22d of July 1817, by which the defendant for and in consideration of the sum of \$750, to him in hand paid, bargained and sold the following negroes, to wit, *George, &c.* "To have and to hold to him, the said

James Forrest, his heirs, executors and administrators, JUNE 1822;
for ever; and the said *Athanasius* hereby doth warrant
and defend the said negroes, against all persons whatso-
ever, to be slaves for life; and the property of the said
James Forrest, his heirs, executors and administrators."

Fenwick
vs
Forrest

The plaintiff also offered in evidence a record from the county court of *Baltimore* county, of an action of replevin instituted on the 6th of May 1817, in that court, by *David Sommerville* against *Athanasius Fenwick*, to replevin negroes *Sarah, George, Grace, Sarah* and *Joseph*, and two other children of the said *Sarah*. The negroes were replevied and delivered to *Sommerville* on the 18th of August 1817, by the sheriff of *Baltimore* county, and at the return day of the writ, counsel appeared for the defendant, but he so appeared at the instance of *Forrest*, and prayed a return of the negroes so replevied and delivered to *Sommerville*; but afterwards and before the return, the counsel moved that his appearance be stricken out, &c. which was accordingly done. The plaintiff further proved by a competent witness, that between the 1st and the 10th of May 1817, six negroes were brought on board his vessel lying at *Baltimore*, and were carried by him to the house of the defendant, and delivered to the defendant, who claimed them as his property, but afterwards said that some of those negroes were in dispute in *Baltimore*, and that the plaintiff was concerned. He then offered evidence, by another witness, that the defendant informed him that he was present at a conversation between general *Winder* and the plaintiff, in August 1817, in which the plaintiff told general *Winder*, who had appeared as counsel in the aforesaid action of replevin, that he did not wish him longer to appear at his instance and request, to defend that suit. The defendant then prayed the court to instruct the jury, that from the pleadings and evidence in the cause, the plaintiff was not entitled to recover; but the court, [*Key* and *Plater, A. J.*] refused the prayer. The defendant excepted, and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, EARLE, and STEPHEN, J. by

Winder, for the appellant, and by

Magruder, for the appellee.

JUNE 1822.

Fenwick
vs
Forrest

EARLE, J. delivered the opinion of the court. In the covenant, which is the ground-work of this case, *Fenwick* warrants and defends the negroes sold against all persons whatsoever, to be the property of *Forrest*, his heirs, executors and administrators. The breach of this covenant, as assigned, is that the negroes, at the time of the sale, were not the property of *Fenwick*, but were the property of one *David Sommerville*, who dispossessed *Forrest* of them by a writ of replevin issued against *Fenwick*, and that *Fenwick* did not warrant and defend the negroes to *Forrest*, as bound by his covenant to do. *Fenwick* to this charge pleads *non infregit conventionem*; and on the trial of the issue, no proof is offered by *Forrest* in support of his case, except the service of *Sommerville's* replevin, and the return of it to *Baltimore* county court, and the neglect of *Fenwick* to appear to the action at the return court, although he was apprised of the resolution of *Forrest* not to defend the replevin. Is this proof sufficient to sustain the action of covenant, is the question, and did the court below err in refusing to instruct the jury, on the prayer of *Fenwick*, that the plaintiff, *Forrest*, was not entitled to recover?

Whether the covenant be considered a covenant for quiet enjoyment of the negroes, or simply an undertaking to warrant and defend the title to them to the vendee, against the acts of all persons whatever, to maintain an action for a breach of it, the plaintiff is bound not only to state specially, dispossession of the negroes, but if it be by a stranger, he must also state a better or paramount legal title to them in such stranger. Dispossession by lawful process need not, however, be set forth, for it is enough to state deprivation of possession by a person having lawful title. *Foster vs. Pierson*, 4 T. R. 617. These statements are material in the plaintiff's declaration, and without them it would be bad on demurrer. If material to state eviction and lawful title by a stranger, it is equally indispensable to support them by proof; and the inquiry is, whether the title of *Sommerville* to the negroes in controversy, whose property they are alleged in the declaration to have been at the time of the sale to the plaintiff, is established by the evidence laid before the jury on the trial of the case? The disturbance of possession proved, is an eviction by process against *Fenwick*, but the mere service of the replevin is no evidence of the right or title of *Sommerville*

to the negroes replevied. How this replevin was disposed of after the return court, does not appear; at that court, the testimony is, that *Forrest* undertook the defence of it, made a motion for a return of property, and then abandoned the case, and that *Fenwick* did not at that term appear to the action. Whether at any future time he became a party to it is no where stated, neither does it appear that the title to the negroes was ever tried on this replevin. If *Sommerville* had made good his claim to the negroes thus replevied, the judgment would have afforded the best evidence, to which the plaintiff in this suit could resort, to prove that he (*Sommerville*,) had a better title to them than *Fenwick*; it would have been the establishment of his right by process of law. But this is not the only testimony the plaintiff in this action might have used to sustain his allegation, that at the time of the sale of the negroes in dispute to him by *Fenwick*, they were the property of *Sommerville*. This material proposition he might have substantiated by any other evidence, written or oral, evincing the fact, and thus have maintained his action of covenant against the defendant. Evidence of either kind, to prove *Sommerville's* right to the disputed negroes, he failed, however, to produce on the trial, and therefore we think the court below ought to have given the directions to the jury prayed for by the defendant.

We reverse the judgment, and order a *procedendo* to issue.

JUDGMENT REVERSED, &c.

COURT OF APPEALS, JUNE TERM, 1822.

PATTERSON vs. THE MARINE INSURANCE COMPANY.

THE SAME vs. THE BALTIMORE INSURANCE COMPANY.]

APPEALS from *Baltimore* county court. They were both of them actions of *covenant* on policies of insurance, brought by the appellant against the appellees. One of the policies was on the ship *Edward*, and the other on her cargo. By each of the policies, which was on a voyage from *Baltimore* to *Lisbon*, it was stipulated, touching the adventures and perils which the assurers were content to

Under a policy of insurance, in the usual form, made during the last war between Great Britain and the United States, the vessel insured proceeded on her voyage and was stopped by the enemy's squadron supporting the blockade of the Chesapeake bay, and sent back to within the policy.

Port—Held not to be an arrest and detention by princes, &c. nor a capture by enemies within the policy.

JUNE 1822.

Patterson
vs
Insurance Comp'y

bear and take upon themselves in the voyage, "are of the seas, men of war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter mart, surprisals, takings at sea, *unlawful* (a) arrests, restraints and detentions of all kings, princes or people, of what nation, condition or quality soever; barratry," &c.

The declaration in each case contained two counts; each setting out the policy of insurance. The *first count* assigned as a breach of the covenant, "that while in the lawful and regular prosecution of her voyage, and before her arrival at *Lisbon* aforesaid, the said ship was, on the high seas, by force and arms arrested, restrained and detained, by certain ships of war, acting under the authority of the King of *Great Britain*; by reason whereof the said ship became wholly lost to the plaintiff, of all which the defendant afterwards, &c. had notice." &c.

The *second count* assigned as a breach of the covenant, "that while in the lawful and regular prosecution of the said voyage, and before her arrival at *Lisbon* aforesaid, the said ship was by force and arms, on the high seas, and in a hostile manner, attacked, conquered, taken and carried away, a prize, by certain enemies of the *United States of America*, subjects of the King of *Great Britain*, then at war with the *United States of America*. Of all which the defendants afterwards, &c. had notice," &c. The defendants pleaded *non infregit conventionem*, and issue was joined.

The plaintiff, at each of the trials, read in evidence the policy of insurance mentioned in the declaration in each case, sealed with the common seal of the defendants, and signed by their secretary, on the 9th of January 1813. By the evidence offered by the plaintiff it appears, that he was, when he caused the insurances to be made, an *American* citizen, residing in *Baltimore*, carrying on trade and commerce, and was the sole owner of the ship and cargo insured, and that both ship and cargo were *American* property, and regularly documented as such, and lying in the port of *Baltimore*. The ship sailed from *Baltimore* on or about the 9th of January 1813, and proceeded on her voyage until the 15th of February 1813, when in the *Chesapeake Bay*, near to *Cape Henry*, she was boarded by several boats from a *British* squadron of ships of war, then lying

(a) The word *unlawful* was omitted in the policy on the goods.

JUNE 1822.

Patterson
vs
Insurance Comp'y

at anchor in *Lynhaven* Bay, near the mouth of the *Chesapeake*. The master of the ship was ordered, by an officer of the squadron on board of the boats, to come to with the ship, and go with his papers on board of the commodore of the squadron, which order he obeyed. He and the ship were forcibly detained by the squadron till the day following, when he received from the commander of the squadron, then supporting the blockade of the *Chesapeake*, the following order: "In pursuance of orders from the right honourable Sir *John Borlase Warren*, K. B. &c. to place the ports of the *Chesapeake* in a state of strict and rigorous blockade, you are therefore hereby directed to quit this anchorage immediately, and proceed to the port from whence you came. Should you be found violating this order, you will be seized and sent in for adjudication." On the receipt of this order, the master immediately returned with ship and cargo to *Baltimore*, where he arrived with them in good order and condition, on the 26th of February 1813. On the same day the plaintiff having received information of the above facts, abandoned both ship and cargo to the defendants in due and reasonable time, which they refused to accept. In the course of ten days, after giving notice to the defendants of his intention to do so, and asking their direction as to the disposition of the vessel and cargo, (which they declined giving,) the plaintiff broke up the voyage, and sold both vessel and cargo to the best advantage, for the benefit of those concerned. To this sale the defendants consented, without prejudice to their right of contesting the plaintiff's right to abandon, &c. At the time of making the policies, of the sailing of the ship, of her detention and return to port, and of the abandonment, open war existed between the *United States* and the King of the *United Kingdom of Great Britain and Ireland*; and that the said squadron, at all said times, was a part of the naval force of said King, employed in carrying on the war; and for the purpose of prosecuting the war, arrived and took its station at the mouth of the *Chesapeake* on the 4th of February 1813, and remained there, on the waters of said bay, for said purpose, until and after the abandonment above mentioned. Before the 4th of February 1813, there was no enemy force regularly stationed at or in the mouth of the *Chesapeake*, or in its waters; but the ships of war, and squadrons of the enemy, did during

JUNE 1822. the whole time from making the policies and for some weeks before, until the 4th of February 1813, cruise along the coast of the *United States*, and pass and repass the mouth of the *Chesapeake*, and from time to time enter the same. The ship *Edward* was of the burthen of 300 tons; and although, while said squadron remained in the *Chesapeake*, some small *American* vessels got to sea, no *American* ship of the size of the *Edward* could do so without extreme danger of capture; and none of that size did, during that time, proceed to sea from the *Chesapeake*, except two, one of which got out on the 4th of February 1813, and the other on the day following. Many other such ships were captured by the squadron during the period last mentioned in the attempt to get to sea from the *Chesapeake*, some of which, having *British* licenses, were released by the *British* admiralty courts. On these facts the plaintiff prayed the opinion of the court, and their direction to the jury, that if they believed said facts, he was entitled to recover. The court, [Dorsey, Ch. J. Hanson and Ward, A. J.] refused to give the direction, and the plaintiff excepted; and the verdict and judgment in each action being against him, he appealed to this court.

Patterson
vs
Insurance Comp'y

The causes were argued before CHASE, Ch. J. BUCHANAN, EARLE, MARTIN, and STEPHEN, J.

Taney, for the appellant—1. The contract of insurance, is a contract of indemnity, and stipulates in substance that the thing insured shall not be prevented, by any of the perils insured against, from proceeding on and performing the voyage insured.

2. "The detention of princes," &c. being one of the perils insured against, the act of the *British* squadron supporting the blockade of the *Chesapeake*, was such a detention, and constituted a total loss under the first count in the declaration.

3. As one of the perils insured against was the acts of enemies, the acts of the *British* squadron constituted a total loss under the second count in the declaration.

4. The first count in the declaration is good as a count for a loss by "enemies," one of the perils insured against in the policy; inasmuch as that count alleges a restraint by an enemy, and a loss by such restraint. The restraint is alleged to have been by a *British* force; and the court must

take notice, that the *British* were then enemies, because the war was declared by an act of congress, and could not be terminated except by a treaty; of both which the court is bound to take notice.

JUNE 1822.
 Patterson
 vs
 Insurance Compy

The declaration assigns two breaches, 1st. Arrest, restraint and detention of princes, &c. 2d. A capture by enemies. On the *first breach* he insisted that the restraint broke up the voyage; that it was one of the perils insured against in the policy, which was general against the restraints of all powers, and was not confined to the enemy; that such restraint continued after the return of the vessel into port, so as to justify the abandonment, and that the plaintiff's right to recover was on the loss sustained. He cited *Olivera vs. The Union Insurance Company*, 3 Wheat. 183. *Odlin vs. The Insurance Company of Pennsylvania*, 2 Hall's L. J. 205. *M^r Bride vs. Marine Insurance Company*, 5 Johns. Rep. 307. *King vs. The Delaware Insurance Company*, 6 Cranch, 71. And *M^r Cail vs. The Marine Insurance Company*, 8 Cranch, 59.

On the *second breach* he insisted, that the capture was by the enemy, and that the voyage was broken up by the capture, one of the perils enumerated in the policy. The operation of the capture continued at the time of the abandonment. He cited *Olivera vs. The Union Insurance Company*, 3 Wheat. 183, 2 Marsh. 567, 568. *Goss vs. Withers*, 2 Burr. 696. *Rhinelanders vs. The Insurance Company of Pennsylvania*. 4 Cranch, 29. The stoppage and detention of the vessel for a day amounted to capture, and was a technical total loss.

Wirt, (Attorney General U. S.) for the appellees, contended, that as the vessel was stopped by the enemy's blockading squadron, and sent back in good order, there was no more right to abandon than there would have been had she never sailed. Under the *first* count in the declaration, which charged the loss by restraint of princes, he insisted that the blockade was not such a restraint within the meaning of the policy. The enemy did not arrest, restrain and detain, but captured as prize. When a sovereign, not at war with the country to which a ship belongs, from motives of necessity arrests her ship, that was a detention of princes. Arrests are the acts of a friend, not those of an enemy. 2 Marsh. 506, 507, 514. Capture is

JUNE 1822. always made with a view to prize, but arrest with a view to restoration. He cited *Hadkinson vs. Robinson*, 3 Bos. & Pull. §88. *Lubbock vs. Rawcroft*, 5 Esp. Rep. 50. *Blackehagen vs. The London Assurance Company*, 1 Campb. 454. 6 Rob. Adm. Rep. 177. *Abbott*, (Storey's Ed.) 406. *Parkin vs. Tunno*, 11 East, 22. *Park*, 618, and *Parkin vs. Tunno*, 2 Campb. 59. The restraint was not an unlawful restraint within the words of the policy on the ship. A blockade is not an unlawful restraint. *Brewer vs. The Union Insurance Company*, 12 Mass. Rep. 170. *McCall vs. The Marine Insurance Company*, 8 Cranch, 59. And *Olivera vs. The Union Insurance Company*, 3 Wheat. 183. Restraints are of two kinds, one actual and the other potential. Actual restraint is an actual possession and holding—in other words, capture. Potential restraint is through fear, &c. An embargo restrains, but does not take possession. A blockade, which keeps a neutral in port, is a potential restraint. No instance can be cited in which a potential restraint has been held to give a right to abandon and to claim for a total loss. If the vessel might be considered as restrained within the meaning of the policy, the owner had no right to abandon when he did, as the cargo had not been injured. In this case the restraint is to be considered as a temporary restraint. *Hudley vs. Clarke*, 8 T. R. 259. *Abbott*, 409. *Blackehagen vs. The London Assurance Company*, 1 Camp. 454. *Park*, 226. *Parkin vs. Tunno*, 2 Campb. 59. and *Smith vs. The Universal Insurance Company*, 6 Wheat. 184. The declaration must bring the case within one of the perils insured against in the policy. *Park*, 538. The peril insured was against unlawful arrests, &c. and the averment in the declaration does not say the arrest, &c. was unlawful.

On the second count, he contended, that the *allegata* and *probata* did not agree; the proof was not that the vessel was "attacked, conquered, taken, and carried away a prize," by the enemy, as averred in this count, but it was that she was stopped as violating the blockade, and ordered to return to port. To constitute it a capture, it was essential that the arrest should have been made with an intention of making the vessel a prize. 2 Marsh. 506. The assured could not abandon after the risk was over. *Hamilton vs. Mendes*, 2 Burr. 1198. 1 W. Blk. Rep. 276, S. C. *Park*,

205. The loss must be by some one of the perils mentioned in the policy, and that peril must be the one stated in the declaration, or the assured cannot recover. Two distinct breaches of the policy cannot be connected in one count. *Hadkinson vs. Robinson*, 3 Bos. & Pull. 388. *Park*, 225, 548. And *Kulen Kemp vs. Vigne*, 1 T. R. 304. The exercise of force by a blockading squadron is no where termed a capture, *M-Call vs. The Marine Insurance Company*, 8 Cranch, 59.

JUNE 1822.

Merryman
vs
The State

Harper argued for the appellant in reply.

JUDGMENTS AFFIRMED:

COURT OF APPEALS, JUNE TERM, 1822.

MERRYMAN, *et al.* vs. THE STATE at the inst. of HARRIS,
use of MURRAY.

APPEAL from *Baltimore* county court. Debt brought on the 4th of May 1818, in the name of the State, at the instance of *T. Harris*, and for the use of *J. Murray*, on the bond executed on the 23d of November 1811, by *William Merryman*, as sheriff of *Baltimore* county, with *Caleb* and *John Merryman* as his sureties. The bond was in due form, and was approved by the orphans court of the county on the day of its date. The defendants below, (now appellants,) pleaded *general performance*, to which the plaintiff, protesting a *nonperformance*, replied, that in March 1811, the state, at the instance and for the use of *T. Harris*, administrator of *J. Gwinn*, (being the *T. Harris* at whose instance this suit was brought,) recovered a judgment against *T. Bailey* for the sum of £10,000 current money debt, and \$7 60 costs, to be released on payment of £897 6 10, with interest from the 18th of December 1807, and costs. That upon this judgment a writ of *fieri facias* issued on the 2d of November 1811, and was directed to, and delivered to said *W. Merryman*, he then being sheriff of said county, to be executed, who laid said writ on certain real property of said *Bailey*, and returned said writ to court, endorsed, that the property remained in his hands unsold for want of buyers. That on the 18th of July 1812, a writ of *venditioni exponas* issued, also directed

If having a judgment against B, and M his surety, issues process thereon, the sheriff makes the amount of the judgment, but only pays a part of it to H, and the balance is paid H by M the surety, they (H & M) not knowing that there were funds in the hands of the sheriff—held, that M's payment does not discharge H's claim against the sheriff, but that the same operates as an equitable assignment of such claim to M, for which he may sue the sheriff's bond. The act of limitations, if relied on, must be pleaded, (note.)

JUNE 1822. to said *W. Merryman*, then being sheriff as aforesaid, commanding him to sell said property, &c. to satisfy said debt and costs. On the 16th of September 1812, in pursuance of this last writ, he sold the property to *J. Murray* and *J. Stevenson*, for \$1280, and received the purchase money. Breach, nonpayment to *Harris* of the money so levied, made and received; &c.

Merryman
vs
The State

The following case was agreed upon—*W. Merryman*, as sheriff of *Baltimore* county, executed his sheriff's bond, with *C. and J. Merryman* his sureties, on the 23d of November 1811, in the form prescribed by law. It was approved on the same day by the orphans court of *Baltimore* county. A writ of *venditioni exponas* was issued on the 18th of July 1812, directed to said *W. Merryman*, sheriff of *Baltimore* county, reciting a judgment recovered in the county court of said county, in March 1811, by the state, against *T. Bailey*, for, &c. That a *feri facias* issued thereon on the 2d of November 1811, and was returned by said sheriff, laid on certain property in his hands unsold, &c. The said sheriff was therefore commanded to expose to sale the said property, &c. to satisfy the said judgment, &c. He proceeded under this writ, and sold the property to the amount of \$1280, on the 16th of September 1812, and received the purchase money, of which he paid to *Harris* \$1087 52, which, with the sheriff's commission being deducted, left in the hands of said *Merryman* \$162 36, part of the money received by him on the sale of the property aforesaid. *J. Murray*, being one of the sureties of *Bailey*, against whom, as then late sheriff of *Baltimore* county, the judgment mentioned in said writ of *venditioni exponas* had been recovered; and being liable as surety of said *Bailey* for said judgment debt, paid to *Harris* the balance thereof that remained due, after he (*Harris*) had received from *Merryman* the \$1087 52 aforesaid. This balance paid by *Murray* exceeded the sum of \$162 36, remaining as above stated in *Merryman's* hands. At the time *Murray* made the payment to *Harris*, neither he nor *Harris* knew that there was any money, on account of said judgment, in *Merryman's* hands. To recover the said sum of \$162 36, remaining in *Merryman's* possession, this suit was brought. The county court gave judgment, on this statement of facts, for the plaintiff, and the defendants appealed to this court.

The cause was argued before BUCHANAN, EARLE, MARTIN, and STEPHEN, J. JUNE 1822.

Merryman
vs
The State

Williams, for the appellants, contended, 1. That this suit having been brought more than five years after the date of the bond, was barred by limitations.

2. That the bond does not appear to have been recorded in the county court, or court of appeals, and was therefore null and void.

3. That the case stated does not correspond with the replication, the replication stating that the original judgment was recovered in favour of the state, for the use of *Harris*, administrator of *Gwinn*, and the case stated not showing that this suit was prosecuted at the instance of any person.

4. That the *fieri facias* and *venditioni exponas* set forth in the replication, were different from those recited in the statements.

5. That the money stated to be in *Merryman's* hands cannot be recovered in an action on his official bond, but must be by an action for money had and received.

6. That *Harris* cannot sustain this action, because, by the statement of the case, the whole of his judgment was paid and satisfied before the suit was brought.

On the *first point*, he referred to the dates of the bond and the writ, and insisted that limitation was a bar to the action, although not pleaded. He relied on the act of July 1729, *ch. 25, s. 3*, and *Draper vs. Glassop*, 1 *Ld. Raym.* 153, (*a.*) On the *second point*, he referred to the act of 1794, *ch. 54, s. 8*. On the *sixth point* he contended, that the money levied under the *venditioni exponas*, was to be paid to the plaintiff in that action, and if he was satisfied with less than the sum made, the residue was to be paid to the defendant. If the plaintiff had not been satisfied the amount levied, then he could enforce payment by attachment, &c. *Harris's* debt being paid, the surety who paid part of it, could not, in this form of action, recover the amount so paid. The surplus made under the *venditioni exponas* not paid to *Harris*, remained in the hands of the sheriff for the benefit of *Bailey*. He cited *Morgan's Lessee vs. Davis*, 2 *Harr. & M. Hen.* 9, 16.

(*a.*) BUCHANAN, J. This court, in *Maddox vs. The State* for the use of *Swann*, at December term 1819, decided, that the act of limitations, if relied on, must be pleaded.

JUNE 1822

Merryman
vs
The State

R. Johnson, for the appellee, cited *Welch vs. Mandeville*, 1 *Wheat.* 233, and *Winch vs. Keeley*, 1 *T. R.* 622.

EARLE, J. delivered the opinion of the court. When *Harris* had levied and sold on his *venditioni exponas* against *Bailey*, to the amount of \$1280, *Bailey* and his securities were exonerated for so much, and for that sum the sheriff, *Merryman*, became liable to *Harris*. He paid him in part \$1087 52, and after deducting commissions, there still remained in his hands \$162 36 due to *Harris*. For this sum *Harris* had a good cause of action against *Merryman*, and if he had been so disposed might have sued him, and his securities, for it, on his sheriff's bond. Things being in this situation as between *Harris* and *Merryman*, *Murray*, one of the securities for *Bailey*, paid the whole balance due *Harris* on his judgment against *Bailey*, deducting the \$1087 52, and overlooking the \$162 36, still in *Merryman's* hands. *Murray* then paid *Harris* \$162 36, under a mistake, and without being obliged as a security of *Bailey* to pay it; and what is to be the legal effect of the payment is the question. Does it extinguish *Harris's* demand on *Merryman*; and if it does not, shall it operate in equity an assignment thereof to *Murray*, so as to enable him to sue the sheriff's bond, and indorse the writ to his own use?

If the payment of this \$162 36 is at all to be considered a payment for *Merryman*, it is manifest *Murray* was not liable to pay it for him; and not having paid it at *Merryman's* instance, it presents the case of a stranger paying the debt of another without his consent or knowledge. Such a payment does not necessarily discharge the debtor, and cannot be taken advantage of by him without showing, by an acquittance or other means, that it was intended by the payer and receiver to operate a discharge. And we think there is great reason in this, for an action for money paid, laid out and expended, cannot be sustained by a stranger against a debtor whose debt he has paid voluntarily and without directions, and therefore he (the debtor,) shall not avail himself of such payment in a suit by his creditor, unless he can show an express intention to extinguish the debt. This is not the case before us—The payment was made by *Murray* to *Harris* voluntarily, and without the knowledge of *Merryman*, and certainly without any intention in *Harris* to discharge the debt of *Merryman*.

But this payment is not to be considered as a payment by *Murray* for *Merryman*. It is received only as an over-payment by him of *Harris's* debt against *Bailey*, and having been made through mistake, he has a legal claim against *Harris* to recover it back. But if the claim should be prosecuted, what would be the situation of *Harris*? He would have to look to his remedy against *Merryman* on his sheriff's bond, and would be greatly injured if the payment to him by *Murray* should be construed a discharge of *Merryman*, which it was never intended to operate.

JUNE 1822.
 Merryman
 vs
 The State

It is then the court's opinion, that the payment made by *Murray* to *Harris*, did not discharge *Harris's* claim against *Merryman*, and that there is a subsisting debt of \$162 36 still due from *Merryman*, and his securities. The remaining question to be enquired into is, can the suit brought for it for the use of *Murray*, under all the circumstances of this case, be sustained by him?

It seems to us, that if in any case a court will undertake to decide on the rights of parties arising from the mere operation of law, where they themselves are silent, to effectuate the purposes of justice, this is the case in which their authority ought to be exerted. The debt of \$162 36 is justly due from *Merryman*, and it matters not to whom he pays it, if the payment is made to the person best entitled to receive it. Whether *Harris* or *Murray* has the best right to the debt, could only be a question between them, and as *Harris* has received value for it of *Murray*, the court think that the payment of *Murray* operated in equity an assignment of it to him, and he had a right to sue for his use the bond of *Merryman* to recover it. In more instances than one this court has decided, that a payment by a security shall operate an assignment of the debt against the principal, so as to enable him to sue, or execute for it, in the name of the creditor, for his use. *Sotheron* and *Reed*, decided but a few years past in this court, is one of the cases of this description. There *Wright* was security in a testamentary bond, and when he paid the creditor his money, and had satisfaction of record entered on the judgment against himself, he was deemed equitably entitled to the judgment against his principal; and a sale under a *fi. fa.* on the judgment for his use, of the land of his principal, was deemed by this court a good and valid sale.

JUNE 1822. Under all the circumstances of this case, we are of opinion, that it is within the principles of our former decisions, and we therefore affirm the judgment.

Steuart
vs
Donaldson

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1822.

STEUART vs. DONALDSON's Lessee.

Where land, liable to confiscation was surveyed under an escheat warrant previous to an application to the executive to purchase it as being liable to confiscation, the grant obtained on the escheat certificate was held to vest a title to the land in the escheator, although the composition money on the escheat was not paid and the grant not issued, until after the application to purchase

APPEAL from *Baltimore* county court. Ejectment for two lots of ground in the city of *Baltimore*, numbered 398 and 399. The general issue was pleaded. At the trial it was admitted that the lots in question were a part of a tract of land called *Mountenay's Neck*, regularly granted in the year 1663, and that the title of the lots had been regularly transmitted to *William Frost*, who being a *British* subject, said lots were confiscated and vested in this state. That *Frost* is since dead, and died before the year 1800, without heirs capable of inheriting. That the defendant, on the 31st of January 1815, lodged information in writing, with the governor and council of this state, that said lots were liable to confiscation, and applied to become the purchaser thereof. That he had made a verbal application to the clerk of the council to purchase the said lots in December 1813, and upon the information and application in 1815, the executive ordered the said lots to be valued, which was done, at the sum of \$2100, in 1817, and sold to the defendant for \$1850, the residue being allowed by them to him for the expense of public paving paid by him on said lots. That the lessor of the plaintiff applied for and obtained an escheat warrant on the 4th of February 1814, to affect said lots as escheat, and having paid \$850, two thirds of the valuation of the same, made as by law is required, on the 27th of July 1815, in pursuance thereof, a patent was granted to him upon a certificate of survey dated the 8th of January 1815. The plaintiff then prayed the court to direct the jury, that on this evidence he was entitled to recover. Which direction the court, [*Ward, A. J.*] gave. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, EARLE, and STEPHEN, J.

Wiander and *R. Johnson*, for the appellant, stated, that JUNE 1822.
 the questions were, 1. Whether or not the escheat grant and previous proceedings of the lessor of the plaintiff overreached the application of the appellant to purchase the property as liable to confiscation, and the proceedings on such application, and vested in him a complete legal title to the premises in question?

Stewart
 vs
 Donahoe

2. Whether by the verbal application in 1813, the appellant did not acquire a prior title to that of the appellee? They cited and relied on the acts of June 1780, *ch. 24, s. 4*; October 1780, *ch. 45, ch. 49, ch. 51, s. 4, 5*; May 1781, *ch. 23, s. 12, ch. 37*; November 1781, *ch. 20, ch. 2, ch. 28, ch. 31*; April 1782, *ch. 19*; 1784, *ch. 55, s. 9*; 1785, *ch. 66, ch. 88, s. 3*; 1788, *ch. 49*; 1789, *ch. 47*; 1791, *ch. 77, ch. 90*; 1792, *ch. 81*; 1793, *ch. 64*; 1795, *ch. 6*; 1799, *ch. 80*; 1802, *ch. 101*; 1803, *ch. 109*; 1805, *ch. 93*; 1814, *ch. 103*; 1817, *ch. 137*. *Smith vs. The State of Maryland*, 6 *Cranch*, 286. *Land Hold. Ass.* 302. *Owings vs. Norwood's Lessee*, 2 *Harr. & Johns.* 96; and *Boring's Lessee vs. Lemmon*, *ante* 223.

T. B. Dorsey, (Attorney General,) for the appellee, cited the act of November 1781, *ch. 20, s. 8*. *Johns. Dict. tit. Confiscation.* 3 *Bac. Ab. tit. Grants*, (I) 393. *Kelly's Lessee vs. Greenfield*, 2 *Harr. & M'Hen.* 121. *Ringgold's Lessee vs. Malott*, 1 *Harr. & Johns.* 299; and *Owings vs. Norwood's Lessee*, 2 *Harr. & Johns.* 96.

CHASE, Ch. J. delivered the opinion of the court. After stating the facts, he said, the question to be determined by the court on the above facts is, Has the grant of the state vested a legal estate in the lessor of the plaintiff in the lands in question?

It appears to the court, that *William Stewart* has not acquired any interest, legal or equitable, in the lands in question. He made no written application to the executive until some time after the date of the certificate of the plaintiff. No caveat was entered against the issuing of the grant. No money was paid the state by him, and no application for a valuation of the land until almost two years after the grant was obtained. This is not the case of conflicting titles of persons claiming under the state.

There is nothing appearing in the case to impeach the grant, no fraud or imposition is stated or suggested as prac-

JUNE 1822. tised by the lessor of the plaintiff in the obtention of the grant, but a full consideration was paid by him according to law.

Johns
vs
Stoops

The court are of opinion, that the patent is valid and operative to pass the title of the state to the land in question to the lessor of the plaintiff.

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1822.

A. & E. JOHNS vs. STOOPS, *et al.*

A. B. by his will directed that his three grandsons should be educated until 21 years of age, out of the profits of his real estate under the direction of his executors, and charged his real estate with the expense of their education. This direction not being complied with they filed their bill, 16 years afterwards, against the devisees in the will, to recover as compensation for the injury they had sustained, as much money as ought, under the provisions of the will, to have been applied to their education. — Bill dismissed

APPEAL from Chancery. On the 26th of April 1792, *Alexander Baird*, by his will, directed that his three grandsons, (two of whom were the complainants, and now appellants, the other being dead,) should be educated out of the profits of his real estate, under the direction of his executors, until they arrived to the age of 21 years; and he charged such estate with the expense of their education. This direction not being complied with, the appellants filed their bill on the 12th of January 1808, against the devisees in the will, to recover as compensation for the injury they had sustained, as much money as ought to have been applied to their education under the provisions of the will. They alleged, that the devisees had not contributed in any manner to their education, but that they had hitherto been educated at the sole expense and charge of their own estate. They prayed that the said real estate be sold, &c. or that the devisees be decreed to pay such sum as should seem reasonable for their education; or that they might have such other and further relief as the nature and circumstances of their case might require. On coming in of the answers, and the return of testimony taken under commissions, the chancellor, by agreement of the parties, decreed that an account between the parties be taken by the auditor, reserving all equity, &c. The auditor reported a balance due to *A. Johns* of \$6370, with interest on \$2875 from the 21st of November 1818; and a balance due to *E. Johns* of \$7205, with interest on \$3500 from the same time. The defendants excepted to the auditor's report on various grounds. The cause was argued by counsel, and submitted.

KILTY, Chancellor, (December term 1818.) This is a case of much difficulty, owing to the uncertainty as to the kind of education intended by the testator, and to the nature of the testimony. The proper course, after the death of the testator, would have been to apply to this court to direct the sums of money to be paid from the profits of the real estate. Supposing (as that was not done,) that the complainants are entitled now to such reasonable sums as should have been raised, with interest, a question will arise, whether there is sufficient testimony to enable the court to ascertain and determine the amount. I do not, however, recollect any case similar to the present, that is, where the suit was brought after the time for accomplishing the object had elapsed. The prayer of relief in the bill was not carefully made. It should have been for an account of the profits of the real estate, as well as for the sale thereof to raise the sums due. There is, however, a prayer for general relief. One of the allegations in the bill, of the complainants having been educated at the sole expense and charge of their own estate, is not proved. At least there is no evidence of actual disbursements so as to support a claim for repayment. The accounts stated by the auditor are founded on the testimony of Doctor *James Scanlan*, who estimates the expense of tuition and boarding at \$250 for each, for the three years next ensuing the death of *A. Baird*. This would be a very moderate estimate if it could be shown that the testator designed a liberal or professional education, or that the board or maintenance of his grandsons was intended to be charged on his real estate. This does not appear, and the presumption is rebutted by his declarations, as proved by *W. Bordley*, that he had already done a great deal, that that was his will, and he could do no more; and also by the unequal burthen which would have been thrown on his other devisees. The smaller sums stated by the auditor for consideration would appear more reasonable, but the testimony of Doctor *Scanlan* would not bear that construction. The argument turned chiefly on the question, whether the complainants were entitled to any sum, more than on the amount, although exceptions had been filed to the auditor's report. And it was not shown that the objection made by him of the want of testimony from which the sum due could be apportioned to the defendants, was unfounded or unimportant. Although

JUNE 1822.

Johns
vs
Stoops

JUNE 1822. justice may require that the complainants should receive an equivalent for the benefits which was intended by the testator, I cannot, on the present proceedings, make a satisfactory decree in their favour. *Decreed*, that the bill be *dismissed*, but without costs. The complainants appealed to this court.

Hughes
vs
Sellers

The cause was argued at June term 1821, before BUCHANAN, EARLE, JOHNSON, MARTIN, and DORSEY, J.

Stephen, for the appellants, contended, that the suit could be sustained. He cited *Blair vs. Owles*, 1 *Munf.* 38. *Greenwell vs. Greenwell*, 5 *Ves.* 199. *Shobe vs. Carr*, 5 *Munf.* 20; and 2 *Brid. Index*, 215, pl. 494.

Winder and Chambers, for the appellees.

Curia adv. vult.

At this term

DECREE AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1822.

HUGHES vs. SELLERS, Adm'r. of REA.

When a plea does not profess to be an answer exclusively to either of the counts in a declaration, it is to be taken as a plea to the whole declaration, and a demurrer to such plea does not work a discontinuance.

In an action of debt on bond given for the purchase money of land sold, referring to a bond of conveyance of the land, if the defendant pleads that a conveyance of the land was a condition precedent to the payment of the money, it is incumbent on him to make proof of the bond of conveyance; and his not doing so, renders the plea bad upon demurrer.

APPEAL from *Harford* county court. Debt on a bond. The declaration contained two counts—The *first* was in the usual form; and the *second* as follows, viz. "And whereas the defendant, (now appellant,) by another writing obligatory dated the 28th day of January 1803, sealed with his seal, acknowledged himself to be held and firmly bound unto the said *George Rea* in his life time, in another sum of \$3200 current money, to be paid unto the said *George Rea*, his heirs, executors, administrators or assigns, when afterwards he should be thereunto required, which writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting to the effect following, to wit, that if the above bound *Samuel Hughes*, his heirs, executors or administrators, should well and truly pay unto the above named *George Rea*, his heirs, executors, administrators or assigns, the full and just sum of \$1600, in the following manner, to wit, \$600 thereof in thirty days from the date last aforesaid, and the remaining \$1000 in one year from the said 28th day of January

JUNE 1822.

Hughes
vs
Sellers

1818, provided that the said *George Rea* should well and truly convey unto the said *Samuel Hughes*, by a good deed in law, two hundred acres of land, agreeably to his bond of the date last aforesaid, then the said obligation to be void, otherwise to be and remain in full force and virtue in law; and the plaintiff avers, that as administrator of the said *Rea* as aforesaid, he did, on the 19th of September 1815, procure a good and valid deed in law to be legally executed by *Abraham Sellers*, &c. the sole heirs and legal representatives of the said *Rea* deceased, in pursuance of the bond of conveyance aforesaid of the said *Rea*; and the said deed so legally executed, the plaintiff, administrator as aforesaid, did on the 27th of September 1815, tender to the defendant, and request him to accept the same as a fulfilment of the agreement contained in the said bond of conveyance by the said *Rea* to the defendant, but the defendant refused to accept the same, to wit, at the county of *Harford* aforesaid, by means of which said premises an action hath accrued to him the plaintiff, administrator as aforesaid, to have and demand of and from the defendant the said sum of \$3200, above demanded; yet the defendant, although often requested," &c. The defendant, by his plea, craved oyer of the bond, which was set out, viz. "Know all men," &c. "The condition of the above obligation is such, that if the above bound *Samuel Hughes*, his heirs, executors or administrators, shall well and truly pay unto the above named *George Rea*, his heirs, executors, administrators or assigns, the full and just sum of \$1600, in the following manner, to wit, \$600 thereof in thirty days from this date, and the remaining \$1000 in one year from this date, provided that the said *George Rea* shall well and truly convey to the said *Samuel Hughes*, by a good deed in law, two hundred acres of land, agreeably to his bond of this date, then the above obligation to be void, or otherwise to be and remain in full force and virtue in law." He then proceeded as follows, viz. "And as to the breach of covenant above assigned, he says, that the plaintiff's action aforesaid thereof against him the defendant to have or maintain ought not, because he says, that according to the tenor of the said bond, and the condition thereof, *Rea*, the intestate of the plaintiff, was bound to convey two hundred acres of land, by a good deed in law, to the defendant, during the life-time of the said intestate, and before the

JUNE 1822.

Hughes
vs
Sellers

right to claim the money in the said declaration and in the said bond mentioned, could accrue; nevertheless the said intestate neglected, failed, and refused to convey as aforesaid to the defendant, during the life-time of him the said intestate, to wit, at the county of *Harford*, contrary to the tenor of the aforesaid bond and condition; and the covenant of the said intestate, being a condition precedent to the performance of the covenant of the defendant, he ought not to be bound to the performance of his covenant, because the said intestate did not, and the plaintiff cannot fulfil the aforesaid covenant of the said intestate, wherefore he prays judgment, if the plaintiff his action aforesaid thereupon against him to have or maintain ought," &c. To this plea there was a general demurrer, and joinder in demurrer. The county court ruled the demurrer good, and gave judgment for the plaintiff, and the defendant appealed to this court.

The cause was argued before CHASE, Ch. J. BUCHANAN, EARLE, and STEPHEN, J.

Winder, for the appellant. 1. The proviso in the bond was a condition precedent—a conveyance was to be executed for the land before payment of the purchase money. 2. The averment in the declaration was not properly made. 3. As there was no answer to one of the counts in the declaration, judgment should have been taken by default on the count not answered. The defendant's plea seemed to be to the second count; but it did not appear to be specially applied to either. He cited 5 *Bac. Ab. tit. Pleas*, &c. (P.) 4. The obligation to convey was a personal one on *Rea*, and could not be performed by his heirs. He cited 1 *Bac. Ab. tit. Conditions*, (P.) 661, 662, 663. *Co. Litt.* 210. *Dyer*, 180, 181. 5 *Coke*, 96.

Raymond, for the appellee, said, that he relied upon the first count, and the second might be stricken out; that the plea was to the first count. The bond of conveyance being in the defendant's possession, he ought to have alleged it in his plea, and set it out. Where there are mutual and independent covenants in separate instruments of writing, each party must rely upon the covenant to himself. He

cited *Portage vs. Cole*, 1 *Saund.* 320, (note 4.) *Terry vs. Duntze*, 2 *H. Blk. Rep.* 389. *Campbell vs. Jones*, 6 *T. R.* 572; and *St. Albans vs. Shore*, 1 *H. Blk. Rep.* 270.

JUNE 1822.

Hughes
vs
Sellers

BUCHANAN, J. delivered the opinion of the court. The suggestion by the counsel for the defendant below, that the plea in this case is to one only of the counts in the declaration, and that the whole action is discontinued by reason of the plaintiff's not having taken his judgment by *nil dicit* on the other count, is not sustained.

The plea does not profess to be an answer exclusively to either count, and as it is not an easy matter, if at all practicable, to determine to which it most strongly applies, it would have been exceedingly difficult for the plaintiff to ascertain on which count to have taken his judgment. It must therefore, be construed most strongly against the defendant; and as a plea to the whole declaration, and so understood, the demurrer did not work a discontinuance. The condition of the bond on which the suit was instituted, refers generally to a bond of conveyance to the defendant, which belongs to him, and for any thing appearing, is in his possession, and on which he relies as containing a condition precedent to the payment of the money.

It was incumbent therefore on him to have made profert of that bond, and to have set out the contents, in order that the plaintiff might have cravedoyer and demurred, or replied to the plea, according to circumstances, and also to have enabled the court to decide, whether the conveyance of the land was a condition precedent, and what assurance was required by that instrument to be made.

But instead of doing this, after oyer of the bond on which this suit was brought, and of the condition, the plea in substance only alleges generally, that a conveyance of two hundred acres of land by *George Rea*, the obligee, in his life-time, to the defendant, was a condition precedent to the payment of the money; that he did not make the conveyance, and therefore that the defendant was not bound to pay, &c. without making profert of the bond of conveyance, or attempting to set out any part of it, which is clearly a bad plea, and the court below did right in sustaining the demurrer.

JUDGMENT AFFIRMED.

JUNE 1822.

COURT OF APPEALS, JUNE TERM, 1822.

Barnes
vs
Gray

BARNES vs. GRAY.

Whether or not the defendant in an action of assault and battery has supported his plea of *son assault demesne*, is for the consideration of the jury, on the evidence.

If on a joint assault and battery the plaintiff severs his actions, all the facts occurring at the time of the assault and battery may go to the jury, at the trial of either of the actions.

APPEAL from *Charles* county court. The appellee, (the plaintiff in the court below,) brought an action of *assault and battery* against the appellant. The defendant pleaded *not guilty*, and *son assault demesne*. To which pleas issues were joined, on the general replication to the last plea.

At the trial the plaintiff examined a witness, who gave in evidence, that the plaintiff was intoxicated when the assault occurred, and that he came into the house, where the defendant was, and made his way through the crowd of other people that were there, parting them, as he went along, until he came to the defendant, whom he took hold of by the collar, or breast. That the defendant twice observed to the plaintiff, that he was an old man, and unable to fight, and requested him to let him go, the plaintiff still held him, without speaking, when the defendant's son, *Thomas Barnes*, seizing the plaintiff's arm, and the plaintiff turning his head, and asking who had hold of him, the defendant struck him, and knocked him down, and struck him two or three times after. That *James Barnes*, another of the defendant's sons, then stamped the plaintiff several times with his feet. It also appeared to the court in evidence, that there was a separate action of assault and battery, next following the present, on the docket, against the said *James Barnes*, and *Thomas Barnes*. The defendant then objected to any evidence being given in this action relative to the acts of *Thomas Barnes* and *James Barnes*, there being separate actions brought against them by the plaintiff. This objection was overruled by the court, [*Key and Plater, A. J.*] and the evidence went to the jury.

The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

Stonestreet, for the appellant, relied on the following grounds for a reversal of the judgment—1. Because the plea of *son assault demesne*, was supported by the evidence of the plaintiff's witness. 2. Because the plaintiff having declared against *Godshall Barnes* alone, could not give testimony of the acts of third persons to aggravate the damages. If he wished to avail himself of such testimony, he might have entitled himself to it by declaring that

he was assaulted and beaten by *Godshall Barnes, cum aliis*, to wit, *Thomas and James Barnes*; but having elected to sever the actions, he must sever the proof. The *allegata* and *probata* must correspond. That there was no proof of any previous concert or combination between the *Barnes's*.

JUNE 1822.

Frazier
vs
Hall

Brawner, for the appellee, contended, 1. Whether or not the plea of *son assault demesne* was supported, was a matter of fact for the consideration of the jury upon the whole of the evidence. He cited 1 *Bac. Ab. tit. Assault and Battery*, 246, 247; and *Esp. Dig.* 315.

2. Where there has been a joint assault and battery, and the plaintiff severs his actions, all the facts occurring at the time may go to the jury at the trial of either action. *Esp. Dig.* 317, 319, 321.

JUDGMENT AFFIRMED.

COURT OF APPEALS, JUNE TERM, 1822.

FRAZIER *et al.* Lessee vs. HALL.

In this case a judgment was recovered by the plaintiff in an action of ejectment in the late general court, at May term 1790.

Mayer for the plaintiff, moved the court, that the term of the demise laid in the declaration be enlarged to one hundred years. He cited *Vickers vs. Hayden*, 2 *Cowp.* 841, and *Turner et al. vs. Worthington et al.* in this court at June term 1817, (a).

MOTION OVERRULED.

(a) *Turner et al. vs. Worthington et al.* in this court at June term 1817, was, on an appeal from a decree of the court of chancery, on a bill of injunction filed in December 1803, by the appellants, to stay proceedings at law on a judgment recovered in an action of ejectment by the appellees' lessee against the appellants, in the late general court at May term 1802, and affirmed on writ of error in the late court of appeals at November 1803, and for other relief. The chancellor, by his decree, dissolved the injunction, and dismissed the bill. An appeal was brought to this court; and the decree having been affirmed,

A motion to enlarge the term of the demise in an action of ejectment, wherein judgment had been rendered in the late general court in 1790, refused.

Where a judgment in ejectment rendered in the late general court in 1802, had been enjoined by injunction, and the case brought to and affirmed in the court of appeals, on appeal from chancery, the term of the demise laid in the declaration was enlarged. (note)

The record of a deed in 1737, corrected so as to make it conformable with the original. (note)

Taney, for the appellees, moved the court at this term, for an enlargement of the term of the demise stated in the declaration of ejectment, it having expired. The object was to enable the plaintiff at law to proceed on his judgment, by issuing a writ of *habere facias possessionem*. He cited *Vickers vs. Hayden*, 2 *Cowp.* 841, and the acts of assembly of 1805, ch. 65, s. 8, 18, 28, 39, and 1806, ch. 41, s. 4.

JUNE 1822.

COURT OF APPEALS, JUNE TERM, 1822.

Law
vs
Scott

LAW vs. SCOTT.

In an action of slander for words spoken, by which the nomination of the plaintiff to an office of profit was rejected by the senate of the United States, the defendant's pleas of guilty as to part, and a special justification as to the residue, and that the words were spoken out of the limits and jurisdiction of the state—*Held to be bad on demurrer.*

The service of copies of the interrogatories

which accompany a commission on the adverse party a sufficient time before the issuing of the commission to enable him to file cross interrogatories, is sufficient notice of the issuing of the commission, and of the time and place of its execution.

The testimony of a senator of the U. S. that the plaintiff's nomination had been rejected by the senate, is admissible evidence, where the plaintiff had applied to the senate for the removal of the injunction of secrecy in relation to such rejection, and failed in the application.

These words of a deposition, "but the charges above mentioned, from their character, could not have failed to have produced its rejection, even if there existed no other reason for it; and they doubtless, I presume, had a very considerable effect in producing it," being the opinion only of the witness, are not competent evidence. It is competent, however, for the witness to say, that such charges caused him to vote against the nomination.

Evidence of the misconduct of the plaintiff, in parti-

APPEAL from Charles county court. This was an action of slander, brought by the now appellee against the appellant. The declaration, after the usual introductory words in actions of slander of the plaintiff's being a good, true, honest and faithful citizen, &c. stated, "and whereas the plaintiff had been nominated by the president of the United States, to the senate thereof, for the office of commissioner of claims, &c. Yet the defendant well knowing the premises, but contriving, and wickedly and maliciously intending to injure the plaintiff in his afore-said good name, fame and credit, and wholly to destroy

Martin, for the appellants, resisted the motion, and contended that this court had no power over the records of the late general court and court of appeals, so as to make amendments or grant the motion. He doubted whether either of those courts, if in existence, could allow the amendment to be made after 16 years. He cited *Hunter vs. Fairfax*, 1 Munf. 218, 237. 7 Cranch, 631, S. C.

Taney, in reply, referred the court to the application made to this court at June term 1816, by William Holmes, to have the record of an old deed in 1737 corrected so as to make it conformable with the original, there being a mistake in one of the courses, where the court ordered the correction to be made.

CHASE, Ch. J. delivered the opinion of the court, (a). The words of the clause in the act of 1805, ch. 65, s. 18, are full and comprehensive, directing the records of the general court for the western shore, (meaning the records of proceedings of that court,) to be deposited with the clerk of the court of appeals for the western shore, and kept in the same manner, as the records of the court of appeals for the western shore, are kept. By the act of 1806, ch. 41, s. 4, all executions which have issued, or shall issue on judgments of the general court, shall have the same effect, and may be proceeded on in the same manner, as executions on judgments of the court of appeals. This is a plain recognition of the judgments of the general court, being records of the court of appeals, and gives validity and legal operation to the acts of the clerk of the court of appeals who issues executions. If the records of the general court are considered as the records of the court of appeals to enable the clerk of that court to issue executions thereon, *a fortiori*, they must be considered as the records of the court of appeals, to enable the court of appeals to do an act necessary for the attainment of justice, in a case too in which no laches or negligence can be imputed to the plaintiff, and the delay has been occasioned by the defendants, aided by the interposition of the court of chancery in exercise of its equitable jurisdiction. If the court have the power to grant the enlargement of the term, it ought to be exercised, because justice requires it.

The court order the term to be enlarged, by striking out the word *ten*, wherever it occurs in the declaration, in ejectment, and inserting in lieu thereof the word *thirty*.

MOTION GRANTED.

(a.) Buchanan, Martin and Dorsey, J. present.

the same, to prevent the confirmation of his said appointment and nomination by the said senate, and to bring him into public hatred, scandal, ignominy and disgrace, and to subject him to the pains and penalties by the laws and statutes of this state, and the *United States of America*, made and provided against those who commit the offences and misconduct hereinafter mentioned to have been charged upon and imputed to the plaintiff, and to vex, harrass, oppress, impoverish, and wholly ruin him; the plaintiff, heretofore, to wit, on, &c. at the city of *Washington*, in the district of *Columbia*, to wit, at the county aforesaid, in a certain discourse which the defendant then and there had with a certain *William T. Barry*, a senator of the *United States'* congress, and divers other senators of the said congress, of and concerning the plaintiff's nomination by the President of the *U. S.* to the senate thereof, for the office of commissioner of claims, &c. and his the plaintiff's having sold out of the district of *Columbia*, and this state, certain of his the plaintiff's negro slaves, into some foreign parts to the southward, he the defendant then and there falsely and maliciously said, rehearsed, proclaimed, and loudly published these false, scandalous, malicious, and defamatory words following, of the plaintiff, in the presence and hearing of the aforesaid persons; that is to say, he (meaning the plaintiff,) had forcibly and fraudulently transported from the district of *Columbia*, and the state of *Maryland*, and sold to the south, negroes entitled to their freedom, he (meaning the plaintiff,) well knowing that the negroes were entitled to their freedom, and had suits depending in the court of *Washington* aforesaid, for establishing their freedom; (meaning that he the plaintiff having in possession certain negroes who he well knew were entitled to their freedom, and were endeavouring by suits at law to recover their freedom, had forcibly and fraudulently carried them out of the jurisdiction of the district of *Columbia* and the state of *Maryland*, and sold them to foreign purchasers of negroes from the southern states;) and that he, (meaning the plaintiff,) was in such habits of intemperance, (meaning drunkenness,) as to be unfit to discharge the duties of any office. And afterwards, to wit, on the day and year aforesaid, at the county aforesaid, by means of the speaking and publishing of which said several false, scandalous, malicious, and

JUNE 1822.

Law
vs
Scott

cular instances, going to prove his unfitness for the office to which he was nominated, is inadmissible.

If the defendant at the request of a senator of the *U. S.* to give him information as to the fitness of the plaintiff for the office to which he was nominated, spoke the words charged in the declaration, and referred to the records of a court for their confirmation, the action cannot be sustained.

Falselhood and malice are the gist of the action for defamation, and where they are not implied from the words themselves, they must be proved.

Words spoken to a senator of the *U. S.* not voluntarily, but at the request of the senator, as to the plaintiff's fitness for an office to which he is nominated, do not imply malice.

Where one of the jury gets sick in the course of the trial, and the verdict is rendered by consent of the parties by the remaining eleven jurors, can advantage be taken of it, on an appeal? *Quere.*

Whether the plea of *non est* as to part, and justification as to the rest of the plaintiff's declaration, is one or two pleas? *Quere.*

JUNE 1822.

Law
vs
Scott

defamatory words, before the said persons, the plaintiff is greatly hurt, injured and prejudiced, in his aforesaid good name, fame and reputation, and is fallen into great hatred and contempt among the said senators, and other good and worthy persons, who, not knowing the falsehood of the said words, but believing them to be true, have withdrawn all their confidence from him, and refused to have any intercourse with him; and also by reason thereof the aforesaid senators of the *United States'* congress, who before and at the time of the committing of the said grievances, were about to concur, and would otherwise have concurred with the president of the *U. S.* in appointing the plaintiff to the honourable and important office of commissioner of claims, to which a highly valuable salary was attached, to wit, the sum of two thousand dollars, to be paid annually; afterwards, to wit, on the day and year aforesaid, at the city of *Washington* aforesaid, wholly and entirely refused to concur with the president aforesaid, in appointing the plaintiff to the office aforesaid, and the plaintiff hath from thence hitherto remained, and continued by means thereof, wholly unemployed in the said office, or any other depending on the will of the said senate; and the plaintiff hath been, and is, by means of the premises, otherwise greatly injured, to wit, at the county aforesaid, to the damage of the plaintiff of twenty thousand dollars current money; and therefore he brings his suit," &c. The defendant in the court below pleaded, 1. *Not Guilty*, 2. "And for a further plea in this behalf, as to the saying and publishing of the said several words of the plaintiff, as in the plaintiff's declaration mentioned, the defendant, by leave of the court, &c. saith, that he is not guilty of saying and publishing the following words; that is to say, the word "fraudulently," the words "entitled" and "were entitled," the words "and state of *Maryland*," the word "suits," and the words "that he was in such habits of intemperance as to be unfit to discharge the duties of any office," (which words are alleged in the said declaration to have been spoken and published by this defendant of the plaintiff,) in manner and form as the plaintiff hath thereof complained against him, and of this he puts himself upon the country," &c. 3. "And as to the residue of the said several words, alleged in the plaintiff's declaration to have been said and published by the defendant of the plaintiff,

JUNE 1822

Law
vs
Scott

the defendant saith, that the plaintiff his action aforesaid thereof against him to have or maintain ought not, because he saith, that before the speaking and publishing of the said residue of the said several words, to wit, on the, &c. two negroes named W. T. and D. T. (who are the same negroes in the plaintiff's declaration mentioned, of whom the discourse in the said declaration stated was held, and no other,) by the defendant, their attorney, filed in the circuit court of the district of *Columbia*, in and for the county of *Washington*, a certain petition, in the words following; that is to say, [Here follows the petition of W. T. and D. T. stating, that they were detained illegally in slavery by *A. Scott*, though they were entitled to their freedom, and prayed process against *Scott*, &c.] And the defendant avers, that the said *A. Scott*, in the said petition named, is the same person as the said *A. Scott* in the said declaration named, the plaintiff in this cause. That the said petition being read and heard, the said circuit court ordered that a *subpena* issue forth out of the said circuit court against the plaintiff, returnable to the next term of the said court; which *subpena* is as follows: [Here follows the said *subpena* in the usual form.] That the said *subpena* did issue forth as ordered by the said circuit court, and that before the return thereof to the said court, and before the service thereof on the plaintiff, to wit, on, &c. at, &c. the plaintiff forcibly seized and transported the said negroes W. T. and D. T. from the said district of *Columbia*, and sold to the south the said negroes, who had petitioned for their freedom as aforesaid, he well knowing that the said negroes had petitioned for their freedom, and had a suit depending in the court aforesaid for establishing their freedom; wherefore the defendant, in a discourse of and concerning the premises, which is the same discourse in the plaintiff's declaration mentioned, and no other, did say, that he, meaning the plaintiff, had transported from the district of *Columbia*, and sold to the south, negroes who had petitioned against him, meaning the plaintiff, for their freedom, he, meaning the plaintiff, well knowing that the said negroes had petitioned for their freedom, and had a suit depending in the circuit court of the district of *Columbia*, for the county of *Washington*, for establishing their freedom, as it was lawful for the defendant so to do for the cause aforesaid; and this, &c. whereof, &c. 4. And for

JUNE 1822. further plea, &c. that as to the speaking and publishing of

Law
vs
Scott

the said several words of the plaintiff as in the plaintiff's declaration, the said several words were not spoken and published of the plaintiff, by the defendant, in the said county, or in any part or place of the state of *Maryland*, but the said words, spoken and published by the defendant of the plaintiff, as by him alleged, were spoken and published out of the limits and jurisdiction of the said state of *Maryland*, in foreign parts, to wit, in the city of *Washington*, and District of *Columbia*; and this, &c. wherefore, &c. The plaintiff joined in issue to the *first* plea, and demurred specially to the *second*, *third*, and *fourth* pleas, because they were immaterial and destitute of form, and double, and utterly insufficient in law to compel the plaintiff to answer thereunto; and he assigned as causes of demurrer, 1st. That the *second* plea by the defendant is a plea which amounts to the general issue, and therefore the general issue should have been pleaded; and not a special denial. 2d. That in the *second* plea the defendant, instead of putting in issue all the words alleged in the declaration, tenders issue on part of the words which are immaterial. 3d. Because in the *second* plea the defendant has put in issue the words "*fraudulently*," "*entitled*," and "*were entitled*," and "*state of Maryland*," "*suits*," and "*that he was in such habits of intemperance to be unfit to discharge the duties of any office*," all of which are immaterial by themselves, and therefore not proper subjects for an issue to be tried by a jury. 4th. Because in the *third* plea there is a justification pleaded without any confession of the injury complained of and intended to be justified, by the said plea. 5th. That in the *third* plea the defendant hath pleaded a special justification, which is in point of law no justification at all, because he says, that the negroes mentioned in the said plea had petitioned for their freedom, and the plaintiff knew thereof, whereas he should have said that the process of the said court had been served on the plaintiff. 6th. Because the words justified by the defendant in the *third* plea are not the same words which are alleged in the declaration. 7th. Because in the *fourth* plea the defendant has denied the uttering and publishing the words alleged in the declaration, in the said county, or any where in the state of *Maryland*, although *Charles* county, in the state of *Maryland*, is laid in the declaration

only by way of venue. 8th. That in the *fourth* plea the JUNE 1822.
 defendant has therein taken for defence, that the words
 alleged in the declaration were not spoken in any part of
 the state of *Maryland*. The defendant joined in the de-
 murrer, and the county court, [*Johnson*, Ch J. and *Pluter*,
A. J.] ruled the demurrers good.

Law
 vs
 Scott

1. At the trial below, the plaintiff offered in evidence the deposition of *Armistead T. Mason*, taken under a commission issued in this cause, to *William Chilton*, and others, of the state of *Virginia*. The commissioners in their return stated, that having first taken the oath prescribed by the commission annexed, and administered the oath to *W. C.* appointed by them as clerk to attend the execution of the said commission, did at, &c. on, &c. proceed to take the deposition of General *Armistead T. Mason*, on interrogatories, &c. he having been previously sworn by *J. M.* one of the said commissioners, &c. The defendant objected to the deposition being read in evidence, because no notice was given to him of the time when and where the deposition was taken, as specified in the following exceptions, made in writing before the jury was sworn, viz. "The defendant excepts to the whole of the deposition of *Armistead T. Mason* returned in this cause, and taken under a commission issued to *W. C.* &c. 1. Because the said deposition was taken without any previous notice to the defendant of the time and place of executing said commission, without his knowledge thereof, and without any opportunity being afforded to him to cross examine the said witness." The county court gave the following opinion: The trial in this case was brought on by consent, and no application was made by either party for a continuance of the cause; and the court being satisfied, that before the commission issued, copies of the original and additional interrogatories were served on one of the defendant's counsel, over rule the exceptions; and are of opinion, that the objection to the execution of the commission cannot be sustained, and permit the deposition to be read; and the same was read in evidence to the jury. The defendant excepted.

2. The plaintiff then produced in evidence the deposition of *William T. Barry*, taken under a commission issued in this cause to *John Bradford*, and others, of the state of *Kentucky*. By the return of the commissioners

JUNE 1822. they stated, that having been first duly sworn according to the annexed oath, and appointed *L. C.* clerk, who was also duly sworn, (certificates of which oaths were annexed,) they proceeded to examine *William T. Barry* on oath, and caused his answers to the interrogatories of the plaintiff to be committed to writing, viz. "*Answer to the first interrogatory.* That he was a member of the senate of the *U. S.* during the first session of the fourteenth congress. *Answer to the 2d.* That he was present in the said senate when the plaintiff was nominated by the president of the *U. S.* to that body for their consent or confirmation for a certain office or appointment. *Answer to the 3d.* That the plaintiff was nominated to the office of commissioner under the act of congress approved the 9th of April 1816, entitled, &c. *Answer to the 4th.* That he had conversation with the defendant relative to the character and qualification of the plaintiff, after the nomination was made, but before it was acted on by the senate. *Answer to the 5th.* He cannot recollect the words the defendant made use of, but it was in substance, "that Mr. *Scott* was addicted to habits of inebriety, and that he had run off and sold negroes that had sued for and were entitled to their freedom." *Answer to the 6th.* He believes that he stated in the senate the purport of this conversation. He is very certain that he stated to the senate the impressions he had received from the conversation with the defendant, and a record that was placed in his hands by Mr. *Wallock*, as to the improper conduct of the plaintiff, in taking away negroes who had sued for their freedom, pending the suit, sending them off to an adjoining state, and selling them. *Answer to the 7th.* The deponent states, that the nomination of said *Alexander Scott* was rejected by the senate. *Answer to the 8th.* He cannot undertake to say what influenced the minds of other members of the senate, but believes his statement did have an influence prejudicial to Mr. *Scott*. *Answer to the 9th.* That the charges as above stated had injured Mr. *Scott*, (a stranger to this deponent,) deeply in his estimation, and that he acted under the influence they had upon his mind in voting against the nomination; for this cause he opposed his nomination, and made known the circumstances that induced him to do so, which he has reason to believe had influence with other members of the senate.

Law
vs
Scott

Answer to the 10th. The annual salary of the office was JUNE 1822, \$2000, but a reference to the act of congress will best show this." The plaintiff, to lay a foundation for receiving other evidence than the journals of the senate of the U. S. to establish the nomination and rejection of the plaintiff to the office mentioned in the above deposition, produced and read in evidence the deposition of *Robert H. Goldsborough*, one of the senators of the U. S. viz. To the *first* interrogatory, Whether he was a member of the senate of the U. S. when the plaintiff was nominated, &c. He answered that he was. To the *second*, Whether he was a member of the military committee, and was present, &c. He answered that he was a member of that committee, and present in the senate. To the *third*, Whether he had, prior to that time, ever heard any thing favourable or unfavourable to the character of the plaintiff? He answered that he had previously to that time, and some time before, heard a favourable character of the plaintiff from a respectable gentleman in *Maryland*. To the *fourth*, What was the nature of the statements of *William T. Barry*, esquire, a member of the senate, to that body, respecting the plaintiff? He answered, that it was wholly incompatible with the duties of the public station he held to state the proceedings of the senate when acting in its capacity of the executive council. To the *fifth*, whether the plaintiff, through his agency, did not endeavour to obtain a removal of the injunction of secrecy of the senate, so far as respected his nomination, and the proceedings thereon, and what was the issue of the attempt? He answered that he did, nor could he obtain either the one or the other. To the *sixth*, he answered that he never heard the plaintiff was not a man of business. The defendant objected to the following words, contained in *William T. Barry's* answer to the *seventh* interrogatory, to wit: "The deponent states, that the nomination of said *Alexander Scott* was rejected by the senate." The court were of opinion that the objection could not be sustained, and therefore permitted those words to be read. The defendant excepted.

3. The plaintiff then produced and read in evidence the deposition of *Armistead T. Mason*, taken under a commission issued in this cause, to *William Chilton* and others, of the state of *Virginia*. In answer to the *first, second,*

Law
vs
Scott

JUNE 1822. *third*, and *fourth* interrogatories, he answered, that he was a member of the senate of the U. S. when the plaintiff was nominated by the president to the office of commissioner, &c. and that it was rejected by the senate. To the *fifth*, By what member of the senate were certain charges tending to criminate the plaintiff brought forward, and what was the nature of the said charges? He answered, that to the best of his recollection Mr. *Barry* did state to the senate, in substance, that he had understood from Mr. *Wallock*, or the defendant, or perhaps from both those gentlemen, that the plaintiff was addicted to habits of inebriety, and that he had been guilty of selling negroes who were entitled to their freedom; and that they, Mr. *Wallock* and the defendant, or one of them, had put into his hands, to corroborate the last charge, a copy of a record, which he exhibited, and from which, the deponent thinks, he read an extract to the senate. To the *sixth*, Whether the rejection of the plaintiff by the senate was occasioned entirely by the charges above mentioned, or what effect had they on the senate in making the appointment? He answered, "It is obviously impossible for me to tell what influenced different gentlemen in their votes on the nomination, but the charges above mentioned, from their character, could not have failed to have produced its rejection, even if there existed no other reason for it, and they doubtless, I presume, had a very considerable effect in producing it; they certainly prevented me from voting for the nomination, which I had intended to do, having a short time before been most favourably impressed towards Mr. *Scott*, by Col. *Monroe*, the present chief magistrate of the *United States*, who spoke of him to me in the most flattering terms." To the *second* additional interrogatory, "Were your impressions as to the character of *Alexander Scott*, prior to his nomination, favourable or unfavourable, and were they derived from a respectable source?" He answered, "They were very favourable, and were derived from a most respectable source, from the present chief magistrate of the *United States*, and a letter from the late honourable *Richard Brent*, of *Virginia*." The defendant objected to the deposition going in evidence to the jury, because, as he alleged, he had no notice of the time and place when and where the evidence was to be taken; the defendant having, before the jury was sworn in this cause, entered

Law
vs
Scott

JUNE 1822.

Law
vs
Scott

the following exceptions, in writing, against the said evidence, which exceptions are stated in the *first* bill of exceptions. The defendant also objected to the following words in the deposition of Gen. *A. T. Mason* in his answer to the *sixth* interrogatory, to wit: "But the charges above mentioned, from their character, could not have failed to have produced its rejection, even if there existed no other reason for it; and they doubtless, I presume, had a very considerable effect in producing it—they certainly prevented me from voting for the nomination, which I had intended to do, having a short time before been most favourably impressed towards Mr. *Scott* by Col. *Morroe*, the present chief magistrate of the *United States*, who spoke of him to me in the most flattering terms." And also to the words following, in the answer to the *second* additional interrogatory, "and were derived from a most respectable source—from the present chief magistrate of the *United States*, and a letter from the late honourable *Richard Brent*, of *Virginia*," and prayed that the same might not be read in evidence to the jury. But the court was of opinion that the passages of the said deposition objected to, were competent and legal evidence. It was proved to the satisfaction of the court, that before the said commission was taken out, a copy of the interrogatories filed by the plaintiff, a copy whereof went with the commission, was served on *C. Dorsey*, one of the counsel in the cause of the defendant, a sufficient time before the commission was sent out, to have filed cross interrogatories, if he thought proper so to do. No other evidence appeared to the court preparatory to the execution of the commission. The court was of opinion, that the service of the interrogatories, as stated, was sufficient, and therefore overruled the objections, and permitted the deposition to be read; and the same was read. The defendant excepted.

4. This bill of exceptions was sent up by mistake, it being similar to the preceding.

5. The defendant, to disprove the averments in the plaintiff's declaration, and to show the unfitness of the plaintiff for the office to which he was nominated by the president of the *U. S.* as mentioned in the declaration, and to show that the plaintiff is not entitled to the damages which he claims in his declaration, offered to read in evidence the deposition of *John F. Gibney*, taken under an

JUNE 1822. Agreement entered into by the parties, viz. To the *second* interrogatory, he answered, that the plaintiff, while at the island of *Porto Rico* in 1813, gave an order to deponent on the house of *T. F. Gamble & Co.* of the island of *St. Thomas*, to receive a quantity of plate, stated by him to be his property; in case of deponent's receiving said plate, a part was to be appropriated for the payment of merchandize, among which was a case of diapers that had been previously agreed upon with a merchant in *St. Thomas* by Mr. *Scott*, which goods Mr. *Scott* informed deponent, were to be brought into the *United States*, stating that he had no apprehension of any package of his being examined. *T. F. Gamble* refusing to give up the plate to deponent, he could not procure the goods. This deponent understood at the same time from said *Scott*, that he had a quantity of other goods to bring into the *U. S.* Deponent asked said *Scott*, at the same time, if he did not apprehend that the said goods would be seized if brought into the *U. S.* and said *Scott* answered; that he had no fears on that score, as from his situation any of his packages would not be examined. To the *fourth* interrogatory—"From your knowledge of the said *Scott* do you consider him to be a man of business"? He answered—"He knows very little of him, having had only a few interviews with him." To the *fifth*, "Do you know, or did you ever hear, that Mr. *Scott* was intemperate?" He answered—"He does not know of his own knowledge; but that he has heard in general conversation that the opinion was that he was intemperate." The plaintiff objected to the answers given by the witness to the *second* and *fourth* interrogatories—And the court thereupon decided, that the said answers were not evidence in this cause, and refused to let the same be read, because the imputed misconduct on the part of the plaintiff in a particular instance, was inadmissible. The defendant excepted.

6. The plaintiff then produced and offered to read in evidence, the commission issued in this cause to *William Nutting*, and others, of the state of *Vermont*, on the 20th of November 1817, and the deposition of *Dudley Chase* taken thereunder, on the 21st of January 1819. The defendant objected to the testimony, taken under that commission, being read in evidence, because the defendant had no notice of the time or place of executing the said

JUNE 1822.

Law
vs
Scott

commission, and the same appeared to have been executed and returned by three of the commissioners named in the commission on the very day that they qualified under it, and without any opportunity being afforded to the defendant of taking any testimony under the said commission. It was proved, on the part of the plaintiff, that a copy of the interrogatories put to the witness under the commission, was served on *C. Dorsey*, esquire, one of the attorneys of the court, who did not appear on record as attorney for the defendant until the 30th of March 1818, when the pleadings on the part of the defendant were filed in this cause, but who appeared at the appearance term as counsel for the defendant, and argued on his part against the motion to hold the defendant to bail; and who at the same time stated he was not counsel of record, and requested the witness to serve them on the defendant, and did not receive them; that the same were served on him (*Dorsey*,) some time in the month of November 1817, and a short time before the commission was sent by the clerk to the plaintiff. And it was also proved to the court, that the defendant himself wrote to the clerk for a copy of the said interrogatories, and that they were sent to him by the mail, and the commission retained in the office until sufficient time had elapsed to receive the cross interrogatories. There was no proof that the defendant ever had any notice of the said commission ever having been sent on by the plaintiff to *Vermont*, nor did the defendant ever apply for such information, or ever intended to proceed under the said commission. And when the same was sent on, to whom, except that it was returned in due form by the commissioners, sealed and directed, did not appear to the court; nor was any information given in relation thereto, or any intention expressed to the defendant to proceed under the said commission, until the said commission and return were handed this day to the court, although the jury was yesterday empannelled to try the cause; but in consequence of the indisposition of one of the jurors, a juror was withdrawn by consent, and another sworn after the said commission was received by the court, and communicated by the court to the parties. The court was of opinion, that the testimony taken under the said commission was admissible in evidence, and the same was accordingly read. The defendant excepted.

JUNE 1822.

Law
vs
Scott

7. The defendant then offered in evidence the commission issued in this cause to *William Sampson*, and others, of the state of *New York*, and the testimony taken thereunder, being the depositions of *Aaron H. Palmer*, *Isaac Kipp*, *Abraham S. Hallett*, *John Kearney* and *James Seaton*, relative to the baggage belonging to the plaintiff, brought by him as a passenger, &c. to the port of *New York*, and to show that certain articles, liable to duty, but upon which no duty was paid, was sold for the plaintiff to the amount of \$1035 65, &c. But the court refused to admit the said testimony. The defendant excepted.

8. The defendant then submitted the following prayer to the court, viz. That if the jury shall find from the evidence in this cause, that the defendant spoke the words as laid in the declaration, and that at the time when the same were spoken, he had been requested by a senator of the *United States* to give him information of the fitness of the plaintiff for the said office, and at the same conversation referred the said senator to the records of the circuit court of *Washington*, in the District of *Columbia*, for the confirmation of the said statement, that then they must find a verdict for the defendant. Which opinion the court, [*Johnson*, Ch. J.] refused to give. The defendant excepted.

9. The plaintiff then produced a witness, *Edmund Key*, who gave evidence, that the plaintiff was a man, from his talents, education and character, qualified to discharge the duties of the office in the declaration stated. The defendant, to prove that the plaintiff was unworthy and unfit to hold the office in the declaration mentioned, produced as a witness *Samuel R. Hughes*, a competent and legal witness, and offered to prove by him, that the plaintiff, holding a commission under the government of the *United States*, to see to the tendering of certain provisions in the name of the said government to that of *Venezuela*, which provisions were purchased under the act of congress of the 8th of May 1812, declared to the said witness, in April 1813, that he intended to purchase a quantity of dry goods, and to import such goods into the *U. S.* without paying duty thereon, and at the same time the plaintiff asked the witness, whether he thought it would be improper for him, the plaintiff, to import the said goods as aforesaid. That the plaintiff did, in pursuance of such intention, purchase

in the *West Indies*, to wit, in the island of *St. Thomas*, a JUNE 1822,
 quantity of dry goods of the value of about \$1000, and
 brought the said goods with him to the island of *Porto Ri-*
co. That the said dry goods were principally of *British*
 fabric, and that the island of *St. Thomas* was, at the time
 of the said purchase, under the dominion of the govern-
 ment of *Great Britain*. That the plaintiff did afterwards,
 in May 1813, import the said goods into the *United States*,
 to wit, into the port of *New York*, and that he offered a
 part of the said goods to the witness in payment of a cer-
 tain sum of money due from the plaintiff to the witness,
 in the city of *New York*. That the plaintiff, in conversa-
 tion with the witness, confessed the truth of the above
 facts in March 1819. But the court decided that the said
 testimony was inadmissible. The defendant excepted.

Law
vs
Scott

Agreement entered into by the counsel of the parties,
 viz. "Inasmuch as *Leonard Mudd*, one of the jurors sworn
 in this cause, is now sick, and unable to attend, therefore
 we agree that the remaining eleven jurors, now sworn in
 the case, shall render a verdict as if all the twelve were
 empannelled. We waive all objections that could not be
 made if the verdict were given by the twelve, the eleven
 concurring. It is agreed further, that the said verdict
 shall have with it, and incidental to it, all powers on both
 sides to take exceptions, remove by appeal, sue out writ of
 error, and in short do all matters and things as if the ver-
 dict were rendered by the twelve." *Verdict* by the re-
 maining eleven jurors was rendered for the plaintiff, and
 damages assessed to \$5000 current money. There was a
 motion by the defendant for a new trial, and the reasons
 assigned were, 1st. That the jury misconceived the direc-
 tions of the court to the jury. 2d. That the verdict was
 against evidence. 3d. That there was no evidence to
 prove the words laid in the declaration; and 4th. That the
 damages are excessive. The court overruled the motion,
 and rendered judgment on the verdict. The defendant ap-
 pealed to this court.

The cause was argued before BUCHANAN, EARLE, and
 DORSEY, J.

Harper and *Magruder*, for the appellant, contended,
 1. That the action, by the appellee's own showing in his
 declaration, could not be maintained.

JUNE 1822.

Law
vs
Scott

2. That the declaration was defective in this, that it does not state that *William T. Barry*, or any other senator with whom the appellant discoursed, communicated such discourse to the senate of the *United States*, and that it did not appear or follow, that the refusal of the senators, (with whom the appellant discoursed,) to concur in the nomination stated, caused the rejection of the said nomination.

3. That the alleged words, not having been stated to have been spoken to the senate of the *United States*, the constitutional tribunal to decide on nominations to office under the *United States* government, the rejection of the appellee's nomination by the senate could not be charged on the appellant.

4. That the special damage was not explicitly or particularly stated, and was impossible to be connected with the cause assigned for it, and was not the natural or legal consequence of the alleged slander.

5. That the words in the declaration laid were not actionable of themselves.

6. That there never was such an office established or recognized by the laws of the *U. States* as commissioner of claims, &c.

7. That the demurrer to the second plea, stating the discourse that actually took place, and justifying such discourse, (with a plea of not guilty to the residue of the discourse alleged in the declaration,) ought to have been overruled by the court below.

8. That the demurrer to the third plea, which alleged that the words charged in the declaration were spoken in a foreign jurisdiction, to wit, in the district of *Columbia*, ought not to have been supported.

9. That the depositions of *Armistead T. Mason*, *William T. Barry*, and *Dudley Chase*, taken under commissions, as stated in the *first*, *second*, *third*, and *sixth* bills of exceptions, ought not to have been admitted in evidence: 1st. Because no notice was given to the appellant of the time and place of executing said commissions. 2d. Because service of a copy of the appellee's interrogatories on *Clement Dorsey*, whose name did not appear at that time on the docket as the appellant's counsel, was not due service. 3d. Because no issue was joined between the parties in the action when the commissions issued. 4th.

Because the deponent, *Armistead T. Mason*, was not sworn by the commissioners, or a majority of them, named in the commission directed to *William Chilton* and others.

JUNE 1822.
Law
vs
Scott

5th. Because it did not appear what oath was administered to the clerk of the said commission. 6th. Because it appeared that the clerk of the commission directed to *John Bradford*, and others, was not duly sworn. 7th. Because the commission directed to *William Nutting*, and others, and the deposition of *Dudley Chase* taken under it, were returned to the court after the jury were sworn.

10. That no testimony ought to have been admitted to prove the nomination of the appellee to the senate to fill the office alleged, or to prove the rejection of the said nomination, except transcripts of the record of the senate, or other written evidence.

11. That no evidence was admissible to prove for what cause the said nomination was rejected, except a resolution of the senate to that effect.

12. That the senate of the *U. States* having refused to remove the injunction of secrecy so far as respected the appellee's alleged nomination and the proceedings thereon, no testimony ought to have been admitted of what occurred in the senate while acting in its capacity of the executive council.

13. That the passages in *A. T. Mason's* deposition, contained in the *third* bills of exceptions, ought not to have been admitted in evidence for the reasons aforesaid; and further, 1st. Because it was hearsay. 2d. Because his vote was not affected by the appellant, but some other person. 3d. Because it contained matters of opinion and belief as to the motives of others.

14. That the same objections apply to *Wm. T. Barry's* answers to the appellee's 8th and 9th interrogatories in the *second* bill of exceptions.

15. That the deposition of *John F. Gibney*, and the depositions taken under the commission directed to *William Sampson*, &c. and the testimony of *Samuel R. Hughes*, ought to have been admitted in evidence under the circumstances stated in the *fifth, seventh, and ninth* bills of exceptions; and because the act of congress of the *United States*, commonly called the act for the collection of duties, incapacitates the person guilty of the offences therein charged from holding any office under the *United States* for the space of five years.

JUNE 1822.

Law
vs
Scott

16. That the instruction prayed by the appellant in the eighth bill of exceptions, ought to have been given to the jury; because, if the appellant spoke the words in the declaration alleged, with a reference to the records of the circuit court, mentioned by way of confirmation or otherwise, it materially varies the words from those laid in the declaration; and if the appellant spoke the said words, in reply to an enquiry of a senator of the *U. States* wishing information, &c. they were not actionable. They insisted, that the action could not be maintained; that the court would not sanction actions against public policy; and that the archives of the executive could not be examined into for private information. *Marbury vs. Madison*, 1 *Cranch*, 137. That to support this action there must be express malice proved. *Rogers vs. Clifton*, 3 *Bos. & Pull.* 594. *Weatherston vs. Hawkins*, 1 *T. R.* 111. *Astley vs. Younger*, 2 *Burr.* 807. *Thorn vs. Blanchard*, 5 *Johns. Rep.* 508. *Lake vs. King*, 1 *Saund.* 131, (and notes.) 4 *Bac. Ab. tit. Libel*, (A.) 452. *Bull. N. P.* 8. *Brooker vs. Coffin*, 5 *Johns. Rep.* 188, 191. That where a special injury resulted from the words spoken, the declaration must accurately describe the special damage; and the *allegata* and *probata* must agree. 2 *Phill. Evid.* 107, 114. *Ashley vs. Harrison*, 1 *Esp. Rep.* 48. *Vicars vs. Wilcocks*, 8 *East*, 1. *Bull. N. P.* 7. That the words in themselves were not actionable, the act of 1796, *ch.* 67, *s.* 15, not making the transporting of negroes an indictable offence, so as to subject the party to infamous punishment; that act punished the party with working on the roads if he did not pay the fine. They referred to the act of 1809, *ch.* 138, *s.* 10, and cited *Puys vs. Gillespie*, 2 *Johns. Rep.* 115. *Brooker vs. Coffin*, 5 *Johns. Rep.* 188. That there were, in fact, but three pleas, although the demurrers stated that there were four. That the *first* was the plea of *not guilty*; the *second*, was *not guilty* of part, and *justification*, setting forth the words spoken, &c. *Cromwell's case*, 4 *Coke*, 12. And the *third* was, that the words, if spoken, were spoken out of the jurisdiction of the state. *Mostyn vs. Fabrigas*, 1 *Cowp.* 161. That the *verdict*, being by eleven jurors, was erroneous, which irregularity could not be cured by consent. 1st. That a release of errors made before verdict was a void release; and 2d. That no consent could give jurisdiction. That the evidence admitted in the *se-*

cond bill of exceptions was not legally admissible to establish the fact of the nomination by the president, and the grounds upon which it was rejected; that it should have been record evidence. That no foundation was laid for the admission of parol evidence. 1 *Phill. Evid.* 322.

On the *fifth*, *seventh*, and *ninth* bills of exceptions, they referred to the act of congress of March 1799, *ch.* 128, *s.* 50. 2 *Phill. Evid.* 109, 115.

On the *sixth* bill of exceptions, they insisted, that as the commission and testimony were not returned until after the jury were sworn, a continuance of the action should have been ordered; that on the substitution of a new juror in the place of the one that was sick, if considered a new jury, only one was sworn.

On the *eighth* bill of exceptions, they cited *Le Caux vs. Eden*, *Dougl.* 601, 602. *Thorn vs. Blanchard*, 5 *Johns. Rep.* 508.

Taney, *Winder*, and *A. C. Bullitt*, for the appellee, contended, that the words in themselves were actionable under the act of 1796, *ch.* 67, *s.* 15, which is in force in *Columbia*, and that our courts notice such acts as are in force in that District. *Davidson's Lessee vs. Beatty*, 3 *Harr. & M'Hen.* 620. That where there was a plea of not guilty as to part, and justification as to certain of the words, and not guilty as to the residue, and the words justified are taken out, then the remaining words would be nonsense, and mean nothing. That a plea producing such an effect could not be considered as an answer to the declaration. That as to the *third* or *fourth* plea, if any action was transitory in its nature, it was slander, and *Mostyn vs. Fabrigas*, if it proved any thing, it was that this was a transitory action; so that it was of no consequence where the words were spoken. *Holt's L. L.* 290, (*note*). *Glen vs. Hodges*, 9 *Johns. Rep.* 67. That if the court had no jurisdiction, then the plea should have been pleaded in abatement. That the irregularity of the *verdict* was cured by the consent of the parties. 2 *Bac. Ab. tit. Error*, (K.) 496, 497, (*and notes*). *Wright vs. Nutt*, 1 *T. R.* 388. 3 *Bac. Ab. tit. Juries*, (K.) 777. That the spirit and meaning of the agreement was, that it should appear by the record that the verdict was given by the twelve jurors. That if it was not considered technically as a verdict given by

JUNE 1822.

Law
vs
Scott

JUNE 1822. twelve jurors, it might be taken, under the agreement, as a reference to, and an award by eleven men. That to consider it a verdict was to save the rights of the defendant, so that he might have the benefit of his bills of exceptions. That when a party had diverted another from his legal course of proceeding, he never should take advantage of those errors he had induced his adversary to commit. *Camden vs. Edie*, 1 H. Blk. Rep. 21.

Law
vs
Frost

On the *first*, *second*, and *sixth* bills of exceptions, as to the manner of executing commissions to take testimony, they referred to *Hind's Pr.* §62.

On the *second* and *third* bills of exceptions, as to the answers of *Barry* and *Mason* to certain interrogatories, they insisted, that the defendant, after due notice of the interrogatories, made no objections, and thereby waived his right of objection; and consented to the questions being answered. That the objection to the answer of *Barry* to the seventh interrogatory, ought not to be sustained, because there is no known rule of law to exclude the evidence of senators; nor any rule of the senate which had been violated. That the constitution provided that the senate should keep a journal of their proceedings; and there was no evidence that they kept a secret journal, or what it contained, if they did keep one, whether of nominations to office, and rejections thereof. That the extent of the obligation of secrecy was not in proof; but that it was in proof, that it might be, and that it had been disclosed. That the court were not to say there was any obligation of secrecy, so as to reject the evidence as not admissible—But that before it was rejected, the court should be satisfied that it was a violation of some moral obligation, as there was no reason why the senate should keep secret any thing more than their journal, not that which might be uttered in their hearing as a slander against an individual. That unless there was proof that there was a record kept of nominations to office, and rejections of such nominations, the evidence was admissible; and if there was a secret journal which could not be come at, then it could be supplied by secondary evidence. But they contended, that the secret journals of the senate were not records, and could not be assimilated to the records of a court. That the whole being secret, they could be come at, only by secondary evidence; so that the foundation for such evidence, if it could not be

JUNE 1822

Law
vs
Scott

proved by parol, could never be laid. That a capricious power exercised by a body, could not exclude a party from proving any fact upon which that body might have acted, or any proceeding which might have taken place therein. That here the evidence was not objected to before the commissioners, as is the practice in chancery; and that not being objected to, it mislead the plaintiff, who supposed that the evidence would not be objected to. But they contended, that the testimony in itself was not exceptionable. That as to what was opinion, and what was fact, had not been very clearly defined. That general reputation of a man's character is said to be a fact. That the character of a man's mind was a fact. That if a man was asked if another had a weak mind, &c. by his answer he would express an opinion. That whether a man suffered pain, must be judged from appearances, and given as opinions, and yet it had been received as testimony. That a man speaking doubtfully of a fact, was received as evidence as far as it went. That one object to be derived from Gen. *Mason's* testimony was the effect the information coming from the defendant produced in the senate. That the cast of mind of the senators, and their character, are all matters of fact. That this slander depended on the character of the senators, and the cast of their mind. That to know whether a particular piece of news created an excitement among the crowd, must be judged of by appearances. That where the testimony was received through the senses, and it was expressed doubtingly, it was to be admitted, as all evidence was where a man did not swear positively to the fact. That in many other instances, which they enumerated, opinions might be given in evidence, and that this was one in which it might be done. That the journals of the senate, if produced, would not show the reasons which governed the senators in their rejection of the nomination; that could be known only from the individual senators. That the reason why all the senators had not been examined, was occasioned by the defendant's not objecting to the question propounded to the witnesses who were examined.

On the *fifth*, *seventh*, and *ninth* bills of exceptions, they insisted, that the evidence was properly rejected. That if that evidence had been admitted, it would be compelling the plaintiff to defend every act of his life. That he could not be deprived of his office, although he might have been

JUNE 1822. guilty of smuggling; for until he was convicted of the charge, it would not have affected him.

Law
vs
Scott

On the *sixth* bill of exceptions, relative to the substitution of a new juror, &c. and proceeding to the trial of the cause after testimony had been returned, they cited 3 *Bac. Ab. tit. Juries*, (K.) 777, and contended, that the return of the testimony taken under a commission, after the jury were sworn, could make no more difference than if a new witness had been produced after the trial had commenced.

On the *eighth* bill of exceptions, they insisted that dangerous consequences would be the result, if a person, upon being required by a senator to give information as to the fitness, &c. of another for office, should be permitted to slander that other. That his reference to the records of a court, to justify his assertions, should not screen him from punishment, as it was not conclusive that there was no malice by such reference. That under the defendant's prayer in this exception, it mattered not with what motive the information was given, and although the jury might find the words were false, and that the defendant knew they were false, and that he spoke them with malice, yet the jury must have found a verdict for the defendant if the prayer had been granted. That if the words spoken were conformable to the record, still if they were spoken with malice, and with an intention to injure the plaintiff, they were actionable. That the case of *Thorn vs. Blanchard* went upon the ground of the absence of malice, and was a strong authority in favour of the plaintiff.

EARLE, J. delivered the opinion of the court. We do not agree with the judges of *Charles* county court in the opinions they pronounced in the *third* and *eighth* bills of exceptions in this record.

In our apprehension the court ought not to have permitted the plaintiff to lay before the jury the following passage in the deposition of General *Armistead T. Mason*:—"But the charges above mentioned, from their character could not have failed to have produced its rejection, even if there existed no other reason for it; and they doubtless, I presume, had a very considerable effect in producing it." This is not a deposition to facts only, resting in the immediate knowledge and recollection of the witness, but is a plain expression of his opinion upon subjects intimately

connected with the discussion, and we think was wholly inadmissible. JUNE 1822

Warfield
vs
Warfield

It appears to us that the court below erred also in refusing to give to the jury the opinion prayed for by the defendant in the *eight* bill of exceptions. This exception, by an agreement between the parties, embodies all the testimony in the record, and with this before them, it is our idea the court ought to have declared to the jury that the action was not sustained; falsehood and malice are the gist of the action for defamation, and where they are not implied in the words themselves, they must be expressly proved. They appear no where in this cause to have been thus proved by the plaintiff, and they are not implied from the occasion of speaking the offensive words stated in the declaration, as they were not officiously volunteered, but were spoken confidentially to a senator of the *United States*, requesting information in relation to the plaintiff's fitness and qualifications for an office to which he had been nominated by the president.

We concur with the opinions delivered by the court below in all the other bills of exceptions, as we do in those pronounced by them on the demurrers.

Reasons for this opinion of the court would have been given much more at large, and perhaps they would have embraced other topics drawn into discussion in the argument, if, continually since it closed, one of the members of the bench had not been unfortunately absent from us.

We reverse the judgment, and direct a *procedendo*.

JUDGMENT REVERSED, &c.

COURT OF APPEALS, JUNE TERM, 1822.

WARFIELD vs. WARFIELD, et al.

APPEAL from the Court of Chancery. It appears by the record that at September term 1813, the seven children of Doctor *C. A. Warfield*, by their petition to the chancellor, prayed that a commission might issue to divide amongst them the real estate of the deceased. The petition stated the death of Doctor *Warfield*, and that the petitioners were his heirs. On the same day the chancellor passed a decree for dividing the lands into seven equal parts; that is, among all the children, and a commission issued accord-

On a petition by the seven representatives of a deceased intestate, for a partition of his lands, under the act of 1786, ch. 45, the chancellor decreed, that partition should be made—but this decree, embracing only the lands of which the intestate died seized, he having conveyed lands by way of

JUNE 1822.

Warfield
vs
Warfield

advancement to H. R. W. one of the representatives, a new bill was filed by the children not advanced, against H. R. W. calling upon him to bring such advancement into hotchpot. By his answer he did not elect to bring in the part conveyed to him, nor did he refuse to do so, but insisted that he had a right to elect after the commissioners should make their valuation. The chancellor considered the answer as an election not to bring in the part conveyed, and decreed the partition to be made of the lands of which the intestate died seized, among the other representatives, excluding H. R. W. From this decree he appealed, but dismissed his appeal on the suggestion of the court of appeal, that an amendment ought to be made so as to bring the question before the court. He afterwards by his petition to the chancellor stated that his answer was misconceived, and prayed leave to amend it, and to elect to bring into hotchpot his advancement at the value of the advancement at the time he received it; which was refused by the chancellor. A commission for partition having been issued and executed, the chancellor ratified and confirmed the return. From that decree H. R. W. again appealed—Held, that H. R. W. ought to have been permitted to amend his answer; and that he was entitled to make his election in the manner set forth in his petition. That the partition made, remain un-

ingly. Afterwards a letter from the commissioners to Richard Snowden, who had married one of the daughters of Doctor Warfield, was filed, in which they decline executing the commission, and assign as their reasons, that they were directed to divide into seven equal parts the land only of which Doctor Warfield died seized, without any mention of the lands deeded to Henry R. Warfield, and Samuel Thomas, (who had married one of the daughters,) which if divided without those lands being taken in, would not effect the object the parties had in view. They therefore recommended an alteration of the commission, &c. Whereupon the chancellor passed an order, saying the decree could not be altered, and suggested another mode of proceeding, viz. That if the persons advanced state their agreement, and join in a petition with the other parties, a commission might be framed accordingly, otherwise the parties not advanced might petition, making the others defendants, and calling on them to make the election; and that the petition might also pray that the former decree should be set aside. In January 1814, the bill, in the case now before the court, was filed against Henry R. and Louisa Warfield, by the rest of the children. This bill states the death of Doctor Warfield, intestate; that he left seven children; that he conveyed certain lands to Samuel Thomas, one of the complainants, who married one of his daughters, and certain other lands to Henry R. one of the defendants; that these conveyances were made as advancements; that Samuel Thomas is willing to bring his part into hotchpot; that Henry R. had agreed at one time to bring his part into hotchpot, and with that view the petition first mentioned had been prepared and agreed to by all the children, and the business entrusted to him as counsel. The bill also states the proceedings on the first petition; that the complainants were advised that no commission to divide could issue until Henry R. should make his election whether to bring his land into hotchpot or not. The bill prays that no further proceedings may be had on the former petition; that the decree may be set aside, and the petition dismissed: It then proceeds to state, that the defendants have refused to join in the second application; that Henry R. has refused to make his election, and prays that he may be compelled to make his election, and that commission may issue to divide the land into seven equal parts, if

he elects to come in, and into six if he refuses. The answer of *Louisa Warfield* is not material to the point in dispute. The answer of *Henry R. Warfield* admits the proceedings on the former petition; he thinks it was the proper mode of proceeding, and assigns his reasons; but does not elect to bring in the part conveyed to him, and does not refuse to bring it in, but insists that he has a right to elect after the commissioners make their valuation. A commission issued, testimony was taken under it and returned, and the cause submitted to the chancellor.

Warfield
vs
Warfield

altered, and leave be given to *H. R. W.* to amend his answer as prayed; and when so amended, that proof be taken of the value of the land given in advancement at the time when it was so given; and if it was of less value than the equal proportion of *H. R. W.* in the whole real estate, then the parties, among whom the partition was made, shall pay severally to *H. R. W.* such sum of money as will be sufficient to make his share of the estate equal in value of one fourth seventh part of the estate at the time of the valuation already made.

KILTY, Chancellor, (December term 1816.) The manner proposed by the answer of the defendant, *H. R. Warfield*, of making the partition and election, is not, in my opinion, such as he is entitled to; and considering the claim of his right thus set up as an election not to bring the part conveyed to him into hotchpot, it is adjudged proper to divide the estate amongst the other heirs, including therein the part conveyed to *S. Thomas*—Decreed, that the defendant, *H. R. Warfield*, be precluded from all participation in or share of the real estate of *C. A. Warfield*, deceased, in the proceedings mentioned; and that the real estate of *C. A. Warfield*, deceased, of which he died seized, including the land conveyed by him to the complainant, *S. Thomas*, be divided into six parts, and that commission issue, &c. From which decree the defendants appealed to this court; and at June term 1818, the cause was argued before BUCHANAN, JOHNSON, MARTIN, and DORSEY, J.

Taney and Winder, for the appellants, contended, that the chancellor ought not to have passed the last decree while his former decree was in force, and the cause still pending on the former petition. They cited 2 *Madd. Chan.* 356, 357, 408. *Cooper's Plead.* 88, 269, 272; and *Hollingsworth et ux vs. M'Donald et al.* in this court, at December term 1807.

Pinkney and Magruder, for the appellees, contended, that the first was not a decree to be enrolled, but was merely an order. They cited *Cooper's Plead.* 266, 268. 2 *Harr. Chan.* 327. 2 *Atk.* 383.

The appellants' counsel dismissed the appeal, on the suggestion of the court that an amendment to the proceedings might be had in the court of chancery, so as to bring the

JUNE 1822.

Warfield
vs
Warfield

true and real point in controversy fully before them, as connected with the question as to the period at which the valuation of the advancement to *H. R. Warfield* was to be made.

H. R. Warfield afterwards, in July 1818, by his petition to the chancellor, states, that by the decree of December 1816, his answer is considered "as an election not to bring the part of his late father's estate, as conveyed to him, into hotchpot," and therefore he is by the decree precluded from all participation in the real estate of his father. That this view of his answer is one which he was not aware could be taken of it, for he always was ready, and now is ready and desirous to bring his said part into hotchpot, claiming to bring the same in at the value it was when conveyed to him. He therefore prayed the chancellor to permit him to answer further, and to state, that he does elect to bring into hotchpot his advancement received from his father at the value of the said advancement at the time he received it. That he had dismissed the appeal, which he prayed from the interlocutory decree, and there had not been any return of the commission, to make partition, issued under that decree, &c.

KILTY, Chancellor, (December term 1818.) A petition was filed on the 1st of July 1818, by *H. R. Warfield*, one of the defendants, for permission to answer further in the cause, and to state, that he does elect to bring into hotchpot his advancement in the manner therein mentioned. Which petition came on to be heard at the present term, and was argued by counsel on each side. It appears, from the proceedings, that a decree was passed at December term 1816, for a division of the real estate of *C. A. Warfield*, deceased, into six parts, excluding the defendant *H. R. Warfield*, for the reasons therein assigned. During the same term two depositions were filed on behalf of the defendant, and admitted by the opposite counsel to be received in evidence. They related to the improved value of the land conveyed to him by *C. A. Warfield* in 1797; and on motion and on hearing, the court decided that the decree should remain unaltered. An appeal was made from the decree to the court of appeals, which the petitioner states that he dismissed, as was admitted in the course of the argument. On the dismissal of the appeal, a commission is-

JUNE 1822.

Warfield
vs
Warfield

tued in pursuance of the decree, which has been executed and returned since the filing of the present petition, and no exceptions have been made thereto, except so far as the petition may be so considered. On that part of the petition, for permission to put in an amended answer, it is to be observed, that the practice of the court is less strict than it is in *England*, and that a discretionary power is exercised to meet the merits of the case, whenever it can be considered open or liable to be opened. In the case cited, of *Weems* and *O'Reilly*, and in that of *Boyce* and *Gassaway*, I did not discover any certain rule to be drawn from the *English* practice. But I incline to the opinion; that the interlocutory decree in this case might be opened, if the answer preferred were such as the merits of the case required. The permission might, however, have been subjected to the terms respecting the intermediate costs, so as to include those of the execution of the commission. But I am of opinion, that the kind of answer proposed in the petition is not such as to meet the merits of the case, or to call for the interference of the court, more especially after the declaration contained in the decree, and the intimation of the sentiments of the court of appeals. The answer proposed in the petition, is somewhat different from the one filed before by the same defendant, but does not appear to be a proper answer to the petition under the act to direct descents. It is an election made subject to a proviso or condition, and necessarily implies a refusal to elect, without a compliance on the part of the court with that condition, according to the maxim, that "*expressio unius est exclusio alterius*." I do not recollect any case in this court, in which the *fifth* section of the act to direct descents, 1786, *ch.* 45, which provides "that any child or children of the intestate, or their issue, having received from the intestate any real estate by way of advancement, may elect to come into partition with the other parceners, on bringing such advancement into hotchpot with the estate descended; but such child or children, or their issue, shall not be entitled to claim a share by descent, without bringing such advancement into the common stock or hotchpot, if there be any child or children unprovided for," was acted on, except that of *Sprigg* and *Sprigg*, cited in the argument, and I shall therefore state my views of that part of the law connected with the common law. In *England*,

JUNE 1822.

Warfield
vs
Warfield

parceners were only by common law or by custom. By common law they could not be such otherwise than by descent. And only females could, in the first instance, be parceners, (making together but one heir,) because in case of a son the land descended to him alone. The act of 1786, *ch. 46*, was passed in order to change the course of descent, and by directing it to be to the children equally, it in effect made them all parceners, and they are so called in the *fifth* section. It is to be presumed that the framers of the act were familiar with the law as to land received in frank-marriage, and that in creating parceners of a new kind or by statute, they saw the necessity of permitting such of the co-heirs, as might have received any real estate by way of advancement, to come into partition, on bringing such advancement into hotchpot, and of excluding them from a share by dissent if they did not bring such advancement into the common stock or hotchpot. Therefore, although gifts in frank-marriage had fallen into disuse in *England*, as stated by *Blackstone*, yet in a provision for the division of lands, the former doctrines, applicable to these gifts and coparcenery of land, ought to be used in the construction of this act, and not those (where they differ,) applicable to the *British* statutes; and our own acts, for the distribution of the personal estates of intestates. It is laid down by Lord *Coke*, that when the lands are put in hotchpot, and the value of each are known, the donees shall retain the land given in frank-marriage, and shall have so much of that in fee descended, as will, together with land given in frank-marriage, make their share equal to that of the other parcener. It is also laid down by the same author, that it is clear that the value shall be according as it was at the time of the partition, assigning his reasons therefor. According to this authority, the condition on which the defendant's election is made to depend, is not such as the law entitles him to. But supposing it doubtful, or that the value ought to be according as it was at the time of the gift or advancement, yet it is a point on which the court is not obliged to decide at the present state of the proceedings. The provisions of the *fifth* section of the act are for the benefit of a co-heir who may have received real estate by way of advancement of less value than any one of the parts descending to the other heirs. They cannot force him, but he may elect to

JUNE 1822.

Warfield
vs
Warfield

come into partition with the other parceners, on bringing such advancement into hotchpot, &c. And here I have to observe, that I do not comprehend the distinction made between the words "advancement and estate," in the answer filed, and in the argument of the defendant. I am of opinion, that the person so disposed, must elect to come into partition, &c. in the words of the act, or to the same effect, leaving for further inquiry and decision the manner of proceeding as to the issuing of the commission, and the manner of valuing and dividing, which are open to exception, and of course to the decision of the court thereon. The condition required in the answer filed, and in the one proposed to be filed, would amount to a negotiation with the court, which is not the usual mode of proceeding. And therefore, in making the decree in 1816, as the condition could not be complied with by the court, I considered it as an election not to bring the part conveyed into hotchpot, or as it might have been more accurately expressed, as not making an election to bring it in. Although the condition is now varied in terms, it amounts in substance nearly to the same thing. And the defendant comes under that part of the law which declares that such persons shall not be entitled to claim a share by descent, without bringing such advancement into hotchpot. The ground of my refusal to grant the petition is, that if an answer, such as is proposed therein to be made, was regularly filed in the cause, I should not consider it as an election to come into partition, and should decree on it as I did on the first answer. It was urged in argument, that the defendant would be barred of relief if the amendment was not allowed, on which the main question could be fairly brought out and finally settled. This remark would have weight if the amendment was such as ought to be offered or ought to be received, but as it is, the consequence, whatever it may be, will be brought on by the defendant himself. He has had full time for consideration, and has had the opinion or intimation of the court of appeals. He has availed himself of his own professional knowledge, in addition to the advice of his counsel, and in lieu of one condition or requisition, he has only substituted another liable to the same objection. The commission has been executed and returned, and an allotment of the six parts agreed to by the parties, excepting the defendant, *H. R. Warfield*; and

JUNE 1822. the permission to put in the answer proposed therein not being granted, a final decree will be made. *Decreed*, that the return of the commissioners, and the division by them made, be and the same is hereby ratified and confirmed. Also *decreed*, that *Richard Snowden* shall hold in severalty in right of his wife *Eliza*, who is deceased, and not jointly with the other parties to this suit, all that part of the said real estate distinguished on the plot, and the return of the commissioners, by the number one, free, clear, and discharged from all claim of the other parties to this suit. And, &c. &c. From this decree the defendant *H. R. Warfield* appealed to this court.

Warfield
vs
Warfield

The cause was argued at the last June term, before *BUCHANAN, EARLE, JOHNSON, MARTIN, and DORSEY, J.*

Taney and Winder, for the appellant. 1. The appellant was not bound to bring in the land itself given to him by his father, but the value of it, such as it was at the time he received it. 2. He was entitled to make his election in that form, and was not bound to make his election in general terms. 3. The chancellor erred in excluding the appellant from the partition on his answer, in which he claimed the right to decide at a future time. 4. The chancellor ought to have allowed the appellant to amend his answer as he proposed in his petition. On the *first point* they referred to the act of 1786, *ch. 45, s. 5. 3 Bac. Ab. tit. Executors and Administrators, (K) 76. Kircudbright vs. Kircudbright, 8 Ves. 51. 2 Blk. Com. 190.* On the *fourth point* they referred to *Boyce vs. Gassaway*, December 1818, and *Weems vs. O'Reilly*, October 1819.

Pinkney and Magruder, for the appellees. 1. The appellant, by not electing whether or not he would bring his advancement into hotchpot, thereby refused to elect. 2. The land itself ought to have been brought in; and if not, then the value thereof at the time of the partition. They cited *3 Jacobs' L. D. tit. Hotchpot. Co. Litt. s. 273.* The acts of 1715, *ch. 39, s. 4, 5; 1798, ch. 101, sub ch. 11, s. 6. Toller on Executors, 176.* They also contended that no appeal would lie from the refusal of the chancellor to permit a defendant to amend his answer.

Curia adv. vult.

THE COURT at this term, being of opinion that there was manifest error in the decree of the chancellor in refusing to allow the defendant, *H. R. Warfield*, to amend his answer agreeably to the prayer of his petition filed in the cause for that purpose, and that he was entitled to make his election in the manner set forth in his petition—*Decreed*, that the decree of the chancellor be reversed, with costs; and that the partition in the proceedings mentioned be and remain unaltered, and that the chancellor pass an order giving leave to the said *H. R. Warfield* to amend his answer according to the prayer of his said petition; and upon the filing of the said amended answer, the chancellor is directed to pass an order directing proof to be taken of the value of the lands given in advancement to the said *H. R. Warfield*, at the time when the same were so given; and if upon such proof the land so advanced shall appear to have been of less value than the equal proportion of the said *H. R. Warfield* in the whole real estate, then, that the parties, among whom said partition was made, or their legal representatives or assigns, shall be decreed to pay severally, to the said *H. R. Warfield*, such sum or sums of money as shall be sufficient to make his share of the said estate equal in value to one full seventh part of the said real estate at the time of the valuation already made by the commissioners. That if upon such partition, so made as aforesaid, *S. Thomas* hath received any addition to the advancement by the said *C. A. Warfield*, in his life-time, as mentioned in the proceedings, then that the said *S. Thomas* pay to the said *H. R. Warfield*, such sum of money as will be his just proportion, in reference to such addition so received by him. And that the chancellor do, from time to time, pass all the necessary orders, directions and decrees, for carrying this decree into execution.

Wright
vs
Freeman

JOHNSON, J. dissented.

DECREE REVERSED, &c.

COURT OF APPEALS, (E. S.) JUNE TERM, 1823

WRIGHT vs. FREEMAN.

APPEAL from Kent county court. The plaintiff below, (now appellee,) brought an action on the case against the

Where a right of way was granted by the county court under the

JUNE 1823. defendant below, (now appellant,) for obstructing a right of way, &c. The declaration stated, "that whereas the plaintiff, before and at the time of the committing of the grievance by the defendant as hereinafter mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of a certain farm and plantation, with the appurtenances thereto belonging, situate, lying and being, in the county aforesaid, and by reason thereof the plaintiff, during all the time aforesaid, ought to have had, and still of right ought to have, a certain way from and out of the said farm and plantation unto, into, through and over, a certain close in the said county, and from and out of the same unto and into a public road or highway in the county aforesaid, and so back again from the said public road or highway unto, into, through and over, the said close, and from and out of the same unto and into the said farm and plantation of the plaintiff, to go, return, pass and repass, with his servants, horses, carts, wagons and carriages, to places of public worship, to mills, market-towns, public ferries, and court-houses, every year, and at all times of the year, at his and their free will and pleasure; yet the defendant, well knowing the premises, but wrongfully and unjustly contriving and intending to injure the plaintiff in this behalf, and to deprive him of the use and benefit of his said way, whilst the plaintiff was so possessed of his said farm and plantation, with the appurtenances aforesaid, to wit, on, &c. and on divers other days and times between that day and the day of issuing forth the original writ in this cause, at Kent county aforesaid, placed and erected, and caused and procured to be placed and erected, divers large quantities of boards, planks, wood and earth, in and across the said way, and put and placed, and caused and procured to be put and placed, divers other large quantities of wood, timber and earth, in the said way, and kept and continued the said boards, planks, wood and earth, so placed and erected in and across the said way as aforesaid, and also the said other wood, timber and earth, in the same way as aforesaid, for a large space of time, to wit, &c. hitherto and thereby, during all the time aforesaid. the said way was and still is, greatly obstructed and stopped up, and the plaintiff, by means thereof, could not, during all the time aforesaid, or any part thereof, nor can he now, have or enjoy his said way as he of right ought to have done, and otherwise might

Wright
vs
Freeman

act of 1785, ch 49, the common law interposed and guarded the enjoyment of this privilege, in the same manner and to the same extent that it was wont to protect a right of way acquired in any of the three modes known to the common law; and an action on the case will lie for obstructing such right of way.

The penalty inflicted by the act of 1785, ch 49, cannot be recovered by the party having a right of way. The disturbance of the way for which the penalty is inflicted is an offence against the state.

An interest in a private way was known to the common law, and a new legislative mode of acquiring such right is not the creation of a new right, but only an additional means by which the right may be acquired.

More than 20 years adverse possession and exclusive use of the lands over which a party claims a right of way, cannot be a bar to an action by him for obstructing such right of way.

Whether or not such adverse possession would have been a sufficient ground on which the court might instruct the jury to presume a release from the parties interested in the road, to the defendant? *Quere*

A right of private way, whether acquired under the principles of the common law or statutory provisions, can be extinguished by a release executed by the parties interested in the right of way, to the owner of the soil.

An adversary user of a private way for 20 years,

and would have done; and hath been, and still is, by means of the premises, deprived of the use, benefit and advantage thereof, to wit, at the county aforesaid; wherefore the plaintiff saith he is injured, and hath damage to the value of five thousand dollars current money, and therefore he brings suit, &c." The defendant pleaded not guilty, and issue was joined.

1. At the trial, the plaintiff, to prove his right of way, laid in the declaration, offered in evidence a copy of a record of a judgment of the late general court, on an appeal from *Kent* county court between *George Wilson*, *James Woodland* and *Isaac Freeman*, appellants, and *Edward Wright*, appellee, on the petition of *Wilson*, and others, to the said court, stating, that for a considerable series of years past they had freely and uninterruptedly, out, from, and into their farms, a road for their conveniency to mill and market, which said road *Edward Wright*, the holder of the lands next adjoining to the post road, claimed a right of stoppage. They prayed that a road might be laid out, &c. The county court, after having caused a road to be laid out by the surveyor, and the testimony of witnesses to be taken and returned, adjudged that the road should run in a particular direction, and awarded damages on account of the said road to *Wright*, &c. From which decision *Wright* appealed to the general court, where the judgment was affirmed, with additional damages to *Wright*, at April term 1792. To the reading of which record the defendant objected; but the court, [*Purnell* and *Worrell*, A. J.] overruled the objection, and permitted the same to be read to the jury. The defendant excepted.

2. The plaintiff then proved the payment of the damages adjudged in the county and general courts to the defendant, by the petitioners in the record mentioned. He also proved that he is one of the grand-children of *Isaac Freeman*, one of the petitioners mentioned in the said record, and resided at the time this action was brought on the plantation on which said *Freeman*, his grandfather, lived at the time the said judgment was rendered. He then proved, that in 1790 he was on the land of the defendant, and saw *S. Wickes*, late surveyor of *Kent* county, run the lines and measure the distance of a road over the land of the defendant, as far as his bank, but not to the main road, and that the said road was never opened or used, nor the

JUNE 1823.

Wright
vs
Freeman

is a sufficient ground for the jury to presume a grant of such way; and if so, it must follow that the non user of the right for 25 years authorises the presumption of its release

An action on the case may be maintained for obstructions made on the road by the defendant, after the time at which the title of the plaintiff for the road became vested, although the plaintiff had not removed the obstructions which existed at the time he acquired his interest

An agreement by parol cannot operate to extinguish an old right of way, or to create a new one—it simply amounts to a license, and as such may be revoked by either party.

JUNE 1823.

Wright
vs
Freeman

fences across the said way ever removed to the present time; but that the petitioners, and those claiming under them, had always, until the year 1816, used a road which was open and used in 1790, and still is open and used, by the defendant's house, and through another part of his farm. The defendant then proved, that the *locus in quo*, or land over which the plaintiff now claims a right of way under the said judgment of the general court, has been in the enclosed possession of the defendant from the year 1790 to the present time, and that the defendant has used and cultivated the same from the year 1790 to the present time; and that the plaintiff, or those under whom he claims, have never used or exercised any right of way over the same. The plaintiff then proved by a witness, that in a conversation with the defendant about January twelve months, the defendant had said to the witness, that the petitioners, or those under whom the plaintiff now claims, had agreed in the year 1792, to take the road by the defendant's house in lieu of the road granted by the judgment of the general court. The plaintiff then proved by a witness, that in a conversation in 1816 with the defendant, he said that the witness might ride the road by the defendant's house, but that if the plaintiff ever rode over that road, he would sue him. Also by another witness, that in 1805, when he was riding the road by the defendant's house, he forbid him to ride the said road; and upon cross examination the witness stated that the defendant and himself had had a difference or disagreement before that time, and that the witness did not tell the defendant where he was going when the defendant forbid him to ride the said road. The defendant then prayed the court to instruct the jury, that if they should believe the defendant held the *locus in quo*, or land over which the plaintiff now claims a right of way, in his the defendant's possession, and has exercised an exclusive right over the same for more than twenty years before the institution of this suit, they must find a verdict for the defendant. Which instruction the court refused to give, but did instruct the jury, that more than twenty years adverse possession and exclusive use of the land by the defendant, over which the plaintiff claims a right of way, could not be a bar to this action. The defendant excepted.

3. The defendant then prayed the court to instruct the jury, that if they should believe the road granted by the

judgment of the general court has not been used by the JUNE 1823.
 parties, nor those who claim under them, for more than
 twenty-five years before the institution of this action, but
 that the said parties to the said judgment, or those claim-
 ing under them, have used another way through the land
 of the defendant, by the defendant's house, instead of the
 road granted by the general court, that the jury may pre-
 sume a release to the defendant of the road granted by the
 said judgment. But the court refused to give the said in-
 struction. The defendant excepted.

Wright
 vs
 Freeman

4. The plaintiff then proved by a witness, that on the
 22d of November 1792, he was at the defendant's house,
 in company with the defendant and the petitioners, when
 the petitioners paid the defendant the damages adjudged
 to him by the county and general courts; that at that time
 the petitioners talked of opening the road, and the defen-
 dant said if they would lay it down, and the distances
 would reach the main road, he would open the road for
 them; that in 1793 a road was open from the division fence
 between the defendant and *Isaac Freeman*, (one of the
 petitioners,) for about one third of the distance across the
 defendant's land, which then turned and run by the de-
 fendant's house; the first part of which road was on the
 ground where *S. Wickes* actually run the road for the pe-
 titioners in the year 1790; which said first part of the road
 remained open until the year 1795, when the witness left
 the neighbourhood. The plaintiff then proved by *S. S.*
 another witness, that the plaintiff and himself, two or
 three years since, rode over the land of the defendant, and
 pulled down his fences, where the witness afterwards saw
J. S. show *J. W.* the present surveyor, as the ground
 over which *S. Wickes*, late surveyor, run the road for the
 petitioners in the year 1790, which fences, after that time,
 were put up, and the ground over which the witness and
 the plaintiff rode, was cultivated by the defendant, and
 that the defendant's stack yard is now on a part of the
 same ground. The defendant then proved by the survey-
 or of *Kent* county, that in February 1818, he was making
 locations for the present plaintiff at his request, and in his
 presence, in an action then depending between the present
 defendant and plaintiff, when he, the witness, was shown
 the ground over which the plaintiff and *S. S.* rode and
 pulled down the fences of the defendant, which ground

JUNE 1823.

Wright
vs
Freeman

was also shown to him as the ground over which *S. Wickes* run the road for the petitioners in the year 1790; that at the same time the plaintiff said the ground over which he and *S. S.* rode was the road he had a right to ride, because it was the original location of the road made in 1790, but that the certificate of *S. Wickes* in the year 1790, was different; and that he the witness, at the request of the plaintiff, did run the lines of the ground over which the plaintiff and *S. S.* rode, and also the lines of the road agreeably to what the plaintiff said was the road as described in the surveyor's certificate mentioned or contained in the record of the judgment of the general court; and found them variant about two degrees or more, as far as the said lines run through the lands of the defendant. And the said witness also proved, that no part of the road leading from the main road by the defendant's house to the lands of the plaintiff, in the year 1818, was near the ground shown to him as the ground over which the plaintiff and *S. S.* rode, or the ground over which he run the lines by the direction of the plaintiff as the lines of the road according to the surveyor's certificate in the record of the judgment of the general court. The said witness also proved, that the fences which the plaintiff and *S. S.* pulled down, were afterwards put up, and the ground ploughed, over which the plaintiff and *S. S.* rode; and also the ground over which he run the lines of the road, according to the surveyor's certificate as aforesaid. The defendant then prayed the court to instruct the jury, that if they should believe the road, granted to the petitioners by the judgment of the general court, was never made by the petitioners, or those claiming under them, by removing the fences and other obstructions from across the said road, that the plaintiff cannot support this action. Which instruction the court refused to give, but did instruct the jury, that the plaintiff could support the present action, though the petitioners, or those claiming under them, had never opened the road granted to them, by removing the fences, or other obstructions, from the same, and had never used the same as a road. The defendant excepted.

5. The defendant then proved by a witness, that in 1807, in a conversation with *Isaac Freeman*, (the father of the plaintiff, and son of *Isaac Freeman*, one of the petitioners named in the before mentioned record,) held in the

court-house, about a presentment against *W. Woodland* for an assault and battery committed on the defendant in this cause, the said *Freeman* said, that *Woodland*, (who was a brother of *James Woodland* one of the petitioners,) ought not to have been presented, because he had a right to ride the road by the defendant's house; that the said *Freeman* also said, the petitioners had had much trouble about the road granted to them by the judgment of the general court, and had agreed, at the instance of the defendant in this cause, to take the road by the defendant's house in lieu of the road granted to them by the judgment of the general court. The defendant also proved by another witness, that in a conversation held at the house of the witness, between him and *James Woodland*, (one of the petitioners,) the said *Woodland* said he had furnished three pair of gate posts to be put on the road leading by the defendant's house, which were put on the said road. The witness also proved, that the road leading from the main road by the defendant's house to the lands of the plaintiff, runs as it did upwards of twenty years ago. The defendant also proved, by another witness, that the road now leading by the defendant's house to the lands of the plaintiff, has been in use for upwards of twenty years, and that the witness has not during that time known any other road to be used through the lands of the defendant to the lands of the plaintiff. The defendant then prayed the court to instruct the jury, that if they believe it was agreed by and between the defendant in this cause, and the petitioners named in the record of the judgment of the general court, that the defendant should have the exclusive use and possession of the land over which the road granted to the said petitioners by the said judgment ran, and that the petitioners instead or in lieu of the said road should have and use another road through the lands of the defendant by his house, that the plaintiff cannot support this action, unless he can prove a legal revocation of the said agreement. Which instruction the court gave. The defendant then proved, by another witness, that there are now living six or seven heirs of each of the petitioners, *Wilson*, *Woodland* and *Freeman*. He then prayed the court to instruct the jury, that the plaintiff of himself could not revoke the agreement made between the defendant, and the petitioners named in the record of the general court. Which instruc-

JUNE 1823.

Wright
vs
Freeman

JUNE 1823.

Wright
vs
Freeman

tion the court, [*Worrell*, A. J.] refused to give, but instructed the jury, that either the plaintiff, so far as he is interested, or the defendant, could revoke the said agreement, if they believed it was by parol only. The defendant excepted. Verdict and judgment for the plaintiff, and the defendant appealed to this court.

The cause was argued at June term 1821, before BUCHANAN, JOHNSON, MARTIN, and DORSEY, J. by

Tilghman and *Eccleston*, for the appellant, and
Carmichael and *Chambers*, for the appellee.

DORSEY, J. delivered the opinion of the court. This case comes before the court on bills of exceptions taken to the opinions of the county court, pronounced in the trial of an action on the case brought in *Kent* county court by *Freeman*, the appellee, against *Wright*, the appellant, for obstructing a private right of way, which the plaintiff claimed over the lands of the defendant. The plaintiff, to establish his right of way over the lands of the defendant, offered in evidence the record of the proceedings of *Kent* county court, and afterwards affirmed in the general court, duly authenticated, by which it appears, that upon the petition of *Woodland*, *Freeman* and *Wilson*, the court granted to them, pursuant to the provisions of the act of assembly, entitled, "An act to declare and ascertain the right of citizens of this state to private roads or ways," passed in the year 1785, *ch.* 49, a right of way over the lands of the defendant. The defendant objected to this record being read in evidence to the jury, but the court permitted it to be read, and the defendant excepted. In support of this exception, it has been urged by the appellant's counsel, that as the act provides that it shall not be lawful for any person to stop up or change, or in any manner obstruct such private road or way, under the penalty of five pounds current money for every such offence, an action on the case cannot be maintained for the alleged disturbance, but that the penalty inflicted by the act must be sought to be recovered, and that therefore a grant of a private road by the county court was inadmissible evidence under the pleadings in this cause. At common law, a private right of way over the lands of another, might be claimed by prescription, grant or necessity, and the dis-

JUNE 1823.

Wright
vs
Freeman

turbance of this easement or servitude could only be redressed in damages by an action on the case. The party claiming this incorporeal hereditament could not bring an action of trespass *vi et armis*, for any interruption or disturbance of it, because he had no estate or interest in the soil, but only the right of passing over it. Now the proposition is most true, that wherever the law gives a right, it also gives a remedy for the violation of such right; and it would seem, that the moment the petitioners, or those who represent them, acquired the right of way over the lands of the defendant, emanating from the judgment of *Kent* county court, the common law interposed, and guarded the enjoyment of this privilege, in the same manner, and to the same extent, that it was wont to protect a right of way acquired in any of the three modes known to the common law. The penalty inflicted by the statute could not be recovered by the parties having a right of way, as the act does not enable them to sue for it. It is not given as a compensation to the parties aggrieved. The disturbance of the way, for which the penalty is inflicted, is emphatically styled *an offence*. An offence against whom? Against the state in its aggregate capacity. But even supposing that the parties injured would be entitled to sue for the penalty, still the common law remedy would attach on every interruption or disturbance of the right of way. An interest in a private way was known to the common law, and a new legislative mode of acquiring such right is not the creation of a new right, but only an additional means by which the same right may be acquired. In this view of the case, then, the penalty given by the statute can only be considered as a cumulative remedy.

In the *second* bill of exceptions, the defendant's counsel prayed the opinion of the court, and their direction to the jury, that if they should believe that the defendant held the *locus in quo*, or the land over which the plaintiff now claims a right of way, in his the defendant's possession, and has exercised an exclusive right to the same for more than twenty years before the institution of this suit, they must find a verdict for the defendant; which instruction the court refused to give, but did instruct the jury, that more than twenty years adverse possession, and exclusive use of the lands over which the plaintiff claims a right of way, could not be a bar to this action. To which the defen-

JUNE 1823.

Wright
vs
Freeman

dant excepted. This court thinks that there is no error in this opinion. The adversary possession of the land by *Wright*, over which the road was laid out, has been relied on by the defendant's counsel as a complete bar to the plaintiff's rights of recovery. It is presumed that by this adversary possession is meant the occupation of the land exclusive of and in opposition to the enjoyment of the way by those who had acquired the right of using it. Can such a possession be set up as a positive bar to an action brought to recover damages for the disturbance of the right of way? There is no statute declaring that such a possession shall amount to a bar. The case does not, unquestionably, fall within the provision of the statute of *James I*, which declares, that no person that has any right or title of entry shall enter but within twenty years next after his right or title shall accrue. This statute applies to lands only, and not to incorporeal hereditaments. The statute of limitation operates as a positive bar in those cases, where it applies, but in all other cases, if the length of time is relied on, it must be submitted to the jury as the foundation of presumption. Thus in *England* there is no statute of limitation that bars an action on a bond, but there is a time when the jury may presume the debt to have been discharged, as where no part of the interest has been paid within twenty years next after the same was demandable. See *Couper*, 102,214. Whether the adversary possession, relied on in this case, would have been a sufficient ground on which the counsel for the defendant might have prayed the court to instruct the jury to presume a release, from the parties interested in the road, to the defendant, it would be improper to decide, as that question is not before us. The court are therefore of opinion, that the judgment must be affirmed on this exception.

We are of opinion, that the court ought to have instructed the jury, as required by the defendant's counsel in the prayer stated in the *third* bill of exceptions. That a right of private way, whether acquired under the principles of the common law, or the statutory provisions of the state, can be extinguished by a release executed by the parties interested in the right of way to the owner of the soil, has not been denied. The question, therefore, is this, can such a release in any case be presumed to have been executed, and if it can, ought not the court to have directed the jury in this case to presume such release? That an adversary

user of a private way for twenty years is a sufficient ground JUNE 1823.

for the jury to presume a grant of such way is fully established by the case of *Campbell vs. Wilson*, 3 East, 294.

Wright
vs
Freeman

So the enjoyment of lights for twenty years, with the acquiescence of the owner of the fee of the adjoining ground, is such a decisive presumption of a right by grant, or otherwise, unless contradicted or explained, that the jury ought to believe it. The doctrine of presumption in those cases, is founded on the principle of quieting rights which have been peaceably and uninterruptedly enjoyed for a length of time; and therefore, the law in its anxiety to protect such rights, presumes that they rightfully commenced in contract. In the case of *The Mayor of Kingston upon Hull vs. Horner, Cowper*, 102, the court directed the jury to presume a grant from the crown, not that the court really thought that a grant had been made, because it was not probable that a grant should have existed without its being on record, but the fact is presumed for the purpose and from the principle of quieting the possession. If therefore the adversary user of a right of a way over the lands of another for twenty years, shall be a sufficient foundation to presume that the right originated in grant, it must follow, upon every principle, that the non user of the right may be extinguished, by presuming a release of it for the purpose of quieting the possession. And the presumption of a release in this case is strongly fortified by the circumstance, that the parties, to whom the right of way in question was originally granted, and those claiming under them, had used another and distinct route over the land of the defendant. We are therefore of opinion, that the court below erred in refusing the prayer, and that they would have been warranted in instructing the jury, if they had been required so to do, that they might and ought to presume a release.

The fourth bill of exceptions presents this question, Can an action on the case be sustained for obstructions made on the road by the defendant after the time at which the title of the petitioners for the road became vested by the judgment of the general court, and the payment of damages, although they had not removed the obstructions which existed at the time they acquired their interest? We are of opinion that the defendant subjected himself to an action by multiplying the obstructions, as he thereby not

JUNE 1823.

Harding
vs
Hull & Tyson

only increased the difficulty of travelling over the road, but necessarily enhanced the expense of opening it. The defendant, by his own act, had no right to impose this additional burthen on the plaintiff. We therefore think that the court below were correct in their opinion expressed in this bill of exceptions.

The opinion expressed by the court below, on the prayer stated in the *fifth* bill of exceptions is, that if the jury believed that the agreement was by parol only, that either the plaintiff, so far as he was interested, or the defendant, might revoke it. By the common law, a private right of way must be created by prescription, (which presupposes a grant,) or by grant, or it must arise by operation of law, and in such case is generally termed a way of necessity; and in all these cases it can only be extinguished by a release, or by the union of the land and the right to the easement, in the same person. So a private way, created by the act of 1785, can only be extinguished in the same way. An agreement, therefore, by parol, in the case now under review, could pass no legal right on either side. It did not operate to extinguish the old right of way, or to create a new one, it simply amounted to a license on either side, and as such it might be revoked by either party. The opinion of the court below was therefore correct.

The court reverse the judgment on the *third* bill of exceptions. The opinions in the other bills of exceptions are concurred in. *Procedendo* awarded.

JUDGMENT REVERSED, &c.

COURT OF APPEALS, (E. S.) JUNE TERM, 1823.

HARDING vs. HULL & TYSON, Garnishees of BOYLE.

Where an attorney of the court appeared for garnishees summoned on an attachment, &c. the court would not strike out the appearance of such attorney, although he had not been authorised by the garnishees to appear for them, and they did not intend to contest the attachment.

APPEAL from *Cecil* county court. The plaintiff in the court below, (the new appellant,) issued out of *Baltimore* county court, on the 30th March 1820, a writ of attachment on a judgment recovered by him in that court in September 1819, against *Hugh Boyle*, directed to the sheriff of *Cecil* county, and reciting, that a writ of *fieri facias* had been issued to, and was returned *nulla bona* by the

A record of the proceedings and final discharge under the insolvent laws, of a person against whose goods, &c. an attachment issued on a judgment rendered against him before such discharge, and laid in the hands of his garnishees, admitted in evidence on the trial against the garnishees.

Such evidence to be left with the jury to say, whether or not it supported the plea of *nulla bona*.

sheriff of *Baltimore* county. The sheriff of *Cecil* county laid the attachment in the hands of, and summoned *Hull* and *Tyson* as garnishees, who appeared by counsel; and pleaded *nulla bona*, to which there was the general replication and issue joined. At the trial, the plaintiff read in evidence certain written certificates, which were admitted by the garnishees' counsel to be in their handwriting, stating, that at the time of laying the attachment in their hands, they had funds belonging to *Boyle*, and that they never authorised any attorney to appear for them to contest the same. The plaintiff then prayed the court to strike out the appearance by counsel; which the court [*Purnell*, A. J.] refused to do. The defendants then offered in evidence a record and proceedings of the insolvency of *Boyle* on his application for the benefit of the insolvent laws, and his final discharge thereunder, granted on the 6th of May 1820, thereby discharging him from all debts, &c. due from or owing or contracted by him before the 31st of December 1819. The plaintiff objected to the reading of the record, as not being admissible testimony under or pertinent to the issue; but the court overruled this objection, and permitted the record to be read to the jury. The plaintiff then prayed the court to direct the jury, that the record thus permitted to be read was not sufficient to support the plea; which the court refused to give, saying it was evidence to be left with the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

JUNE 1823.

Harding

Hull & Tyson

The cause was argued before BUCHANAN, MARTIN, DORSEY, and STEPHEN, J. by

Rudolph, for the appellant, and by

Chambers and *J. Bayly*, for the appellees.

JUDGMENT AFFIRMED.

JUNE 1823: COURT OF APPEALS, (E. S.) JUNE TERM, 1823.

Mason
vs
Harrison & Boggs

MASON *et al.* Lessee, vs. HARRISON and BOGGS.

A will thus attested—"In witness whereof I, this 14th day of June 1817, declare and publish this to be my last will and testament, in the presence of," and witnessed by three witnesses, who proved that the testator, at the time of making his will, appeared cool and collected, and perfectly in his senses, and to understand perfectly what he was about; that a pen was put into his hands, and he said he must make his mark: that one of the witnesses assisted him to make his mark, by pressing his fingers to the pen; that the witness did not perceive that the testator made any effort whatever in making the mark, but he appeared to understand perfectly what he was about; that the witnesses and testator were all in the same room when they commenced subscribing their names, but there were some doubts whether he was in the room at the time the last witness had finished subscribing his name. The will was taken by the witnesses to the room in which the testator had been carried, and he was asked if it was his will; and he answered yes. That the testator, when the witnesses subscribed their names, had his back to the table, and he might have seen them subscribe their names if he had turned his head round; and one of the witnesses believed he could have turned his head or body, but another of the witnesses thought that he could not turn his head, from his debility or weakness. The county court held, that the execution of the instrument of writing was not according to law, and had not been sufficiently proved, and refused to permit it to be read to the jury; and also refused to permit the evidence, given in relation thereto, to be submitted to the jury. On appeal, reversed by the court of appeals.

APPEAL from *Caroline* county court. Ejectment for two tracts of land, one called *Tilghman's Gift*, and the other called *Tilghman's Gift Resurveyed*. The defendants, (the present appellees,) pleaded the general issue. At the trial, the plaintiff deduced a regular title to the lands in question down to *Thomas Mason*, under whom the lessors of the plaintiff claimed title. He then produced an instrument of writing, purporting to be the last will and testament of the said *Mason*, whereby, amongst other things, he devised unto his brother *William Winchester Mason's* children, all of his real estate in fee, and personal estate to be equally divided; and concluded as follows. "In witness whereof I, this 14th day of June 1817, declare and publish this to be my last will and testament in the presence of," and it was attested by three witnesses viz. *Solomon Scott, John Thomas* and *Charles Tilden*, who, by their probate to the instrument, made oath, "that they did subscribe their names as witnesses to the said paper writing, which was signed by *Thomas Mason*, in the presence of them, as his last will and testament, and that the said paper writing is the self-same identical paper that they and each of them did sign as witnesses, as and for the last will and testament of the said *Mason*." The plaintiff then gave in evidence, in relation to the said instrument of writing, by a witness named *Solomon Scott*, that on the 14th of June 1817, he went to the house of *Thomas Mason*, who was very bloody, and appeared badly wounded. That Doctor *John Thomas* observed to him, that *Mason* wanted his will written, and said "stay and write his will, as you can write better than I can." The witness then asked for and obtained pen and paper. About this time *Henry R. Pratt* came into the room, and said "give me the pen, I can write faster than you." *Pratt* then sat down to write the will, and after the preamble was written, Doctor *Thomas* told *Mason* they were ready to write the will. *Thomas* then asked him how he would

write the will. *Thomas* then asked him how he would

JUNE 1823

Mason
vs
Harrison & Bogg

have his property devised? He said "give it to my brother's children." The witness then told *Thomas* to ask *Mason* if he meant his brother *William Winchester Mason*? *Mason* said yes. Then *Pratt* wrote down the devise of the real estate in fee, and the personal to be equally divided amongst them. *Mason* then said, "I want to make some other devises." *Pratt* then wrote down, "with the following exceptions." *Thomas* then asked *Mason* what else he wished to dispose of? He replied, give to *Luther Kirtz* the tan-house lot, and all on it. *Thomas* then asked him if they should include the currying shop? And he said "no; begin at the gate, run with the lane to the ditch." *Mason* being asked a second time if the currying shop should be included, answered "no," and seemed somewhat irritated, and said again, "begin at the gate, run with the lane down to the ditch." *Thomas* asked what else he would have disposed of? *Mason* said "give to Mr. *Coursey* old *Sam*, his wife *Miana*, and their youngest child." He was asked, what *Coursey*? And he answered, "*Samuel Coursey*." *Thomas* then asked *Mason* what else? When he said "Mrs. *Londen* has been long in my service, and done a great deal for me, and was getting old, and I think it right to do something for her," and then said, "give her \$100 per annum for life out of my estate." *Mason* was then asked if there was any thing esle? He said "no." *Thomas* then asked him who he would have for his executor? and he said "Mr. *Bourke*." He was asked if he meant *William Y. Bourke*? and he replied "yes." *Pratt* having written down these things, took the paper to *Mason*, and read it to him. *Pratt* then took the paper to the table, and wrote the concluding part of it. *Thomas* then told *Mason* the will was ready to be signed, and called for a book to lay the paper on, and then took the paper to *Mason*, he being raised up; *Thomas* put the pen in his hand, but *Mason* did not make any attempt to use the pen. *Thomas* then rose up, and said to the witness, "I wish you would put the pen in his hand." The witness then put the pen in *Mason's* hand, and pointing with his left hand said, "Mr. *Mason* sign your name here," pointing to the place where he was to sign. *Mason* made no attempt to use the pen; the witness looked at him, and seeing his head begin to settle down to his breast, said to Mr. *Coursey* "lay him down, for he is dying." Doctor *Tilden*, who had just be-

JUNE 1823.

Mason
vs
Harrison & Bogg

fore come in, had some toddy made, and put it into *Mason's* mouth with a tea-spoon, and after a short time *Mason* revived and seemed as well as he was before. It was proposed by some one in the room to take *Mason* and put him on the bed, but the witness said it would be best for *Mason* to sign his will where he was. The witness then took the will to *Mason*, he being raised, and put the pen in his hand, and said to *Mason*, "sign your name here," pointing to the place where he was to sign. *Mason* then looked at the witness, and said "I cannot see." His spectacles were got and put on his nose. *Mason* then said, "I must make my mark." The witness asked those who were standing by if they thought it would be wrong to assist him to make his mark, who said no. The witness then put his hand to that of *Mason*, and pressed his fingers to the pen, and assisted him to make his mark or cross upon the said instrument of writing, as it appears thereon; but the witness did not perceive, nor does he think that *Mason* made any effort whatever in making the mark or cross. On being asked, the witness said that *Mason's* hand lay on his thigh, and was extremely cold. The witness then took the paper to the table, and wrote *Mason's* name—his christian name on one side of the mark, and his surname on the other, and the word "his" above the mark, and the word "mark" below the mark. The witness then observed to Doctor *Thomas* and Doctor *Tilden*, "we must be witnesses," there being no other persons present. The witness then subscribed his name as a witness, and Doctor *Thomas* and Doctor *Tilden* did the same, as quick as one could write after the other; and *Mason* was in the room when they all signed. The witness is certain that *Mason* was not out of the room when *Tilden* subscribed his name, and just as *Tilden* had written his name, they were taking *Mason* up to carry him out, but he is sure that before he got to the passage door *Tilden* had written his name. As soon as the witness thought they had got *Mason* on his bed, he said to Doctor *Thomas* and Doctor *Tilden*, "let us take the will into the room to *Mason*, and ask him if this is his will." The two Doctors, and the witness, then went into the room where *Mason* lay; as they entered the room he was lying on his back, but just then stretched himself, and turned partly on his left side. The witness then held the paper before him, and asked him "Is this your will?" and he

said "yes." The witness then asked him who should take charge of the will; shall Doctor *Thomas*? He said "yes." The will was then folded up and given to Doctor *Thomas*. When the witness, Doctor *Thomas* and Doctor *Tilden*, subscribed as witnesses, *Mason* was in the same room; that the table where the witnesses subscribed their names was at the opposite side of the room, or the side of an opposite door, and partly between the door and a window, and *Mason*, as he lay, might have seen the witnesses subscribe their names to the will if he had turned his head round; and the witness believes he could have turned his head or body, (because he saw him turn in his bed as before stated,) at the time the witnesses subscribed their names. The bed, on which *Mason* was lying, was drawn back, and *Mason* was resting more on his back, than when he was held up. That all the time when *Mason* was giving out his will as aforesaid, he appeared cool and collected, and perfectly in his senses, and to understand perfectly what he was about. And at the time the said mark was made, *Mason* appeared to do the same. The plaintiff then further gave in evidence the same facts by *Henry R. Pratt*; and also gave in evidence, by Doctor *Charles Tilden*, that he was called on as a physician to attend *Mason*, &c. After *Pratt* had finished writing, the instrument of writing was brought to *Mason* where he sat, either by Doctor *Thomas* or Mr. *Scott*. He appeared then so much debilitated, that the witness thought he must sink, and proposed he should be laid down. He was laid down, and in a short time some toddy was given to him by the witness, and after a few minutes a revival appeared to take place, indicated by his raising his eye-lids, and holding his right hand, and shaking hands with some person. *Mason* was then raised up, and the instrument was presented to him again, and the pen was put into his hand, and he held it in his hand, but he appeared to be so tremulous in his hand that it was proposed that he should make his mark, and the mark was made by the assistance of *Solomon Scott*. The paper was then taken to the table, and the witness and *Solomon Scott* and Doctor *Thomas*, went to the table, and *Scott* observed we must be witnesses to the instrument of writing. The witness and Doctor *Thomas* subscribed the will as witnesses, and the witness has every reason to believe that *Solomon Scott* also signed it, because he saw him writing. The wit-

JUNE 1825.

Mason
vs
Harrison & Boggs

JUNE 1823. *Mason* signed after Doctor *Thomas*. As soon as the witness got up out of the chair, after he had subscribed his name, he immediately turned round, and did not see *Mason*, he having been removed into another room. It was then proposed by *Scott* that they should go into the other room with the paper, which was agreed to, and they went into the other room, where they found *Mason* lying in the bed partly covered. *Thomas* or *Scott* then held up the paper to him; and asked him "Is this your — (something, for the witness did not recollect whether he said will or not,)" to which he replied "yes." *Scott* then asked him if he should give the paper to Doctor *Thomas*? and he answered "yes." Doctor *Thomas* then asked him if he should seal it up there, or take it home and seal it? to which he replied "take it home." *Mason* in a very few minutes after asked for his keys, and they were brought to him. He then told some one to look in one of the drawers, and there they would find some notes, and nearly about the same time Mrs. *Londen* asked him if he remembered \$20 that she had loaned him? he said "yes," and then told some one to pay her \$20 in specie, saying that there was some specie in one of the drawers. That at the time the witness went to the table to subscribe as a witness, *Mason* was sitting at the front, supported with his back towards the table, and could not see the witness subscribe the paper without turning his head, and he thinks that he could not turn his head from his debility or weakness. That *Mason* died in about three quarters of an hour after he was removed into the other room. The plaintiff then gave in evidence to the jury, by the testimony of *William Hardcastle*, *Robert Hardcastle*, and *Beckington Scott*, certain facts which are not considered to be material. The plaintiff then offered to read to the jury the aforesaid instrument of writing, as the last will and testament of the said *Thomas Mason*, and to submit to them the foregoing evidence which had been given respecting the same; but the defendants objected to the reading of said instrument to the jury, as not having been executed according to law, and sufficiently proved. The court [*Martin*, Ch. J. and *Robins* A. J.] were of opinion, that the execution of the said instrument was not according to law, and had not been sufficiently proved, and so declared, and refused to permit it to be read to the jury; and also refused to per-

Mason
vs
Harrison & Begg

mit the said evidence, given in relation thereto, to be submitted to the jury. The plaintiff excepted; and the verdict and judgment being for the defendants, he appealed to this court.

JUNE 1822.

Hayes
vs
Lusby

The cause was argued before BUCHANAN, EARLE, DORSEY, and STEPHEN, J. by

Bullitt and Kerr, for the appellant, and by

J. Bayly and Carmichael, for the appellees.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

COURT OF APPEALS, (E. S.) JUNE TERM, 1823.

HAYES vs. LUSBY.

APPEAL from Cecil county court. The cause was argued before BUCHANAN, MARTIN, DORSEY, and STEPHEN, J. by

Chambers for the appellant, and by

Carmichael and Gale, for the appellee (a).

The case is sufficiently stated in the opinion of the court, which was delivered by

DORSEY, J. The plaintiff had sued forth from Cecil county court a writ of *replevin* against *Thomas Etherington*, directed to the defendant, (now appellee,) as sheriff of Cecil county, on which he made return that he had replevied and delivered the goods and chattels mentioned in the writ. The present suit was instituted to recover damages for an alleged false return by the defendant; the plaintiff complaining that the goods and chattels were not delivered to him, as stated by the defendant in his return; and on the trial of the issue three bills of exceptions were taken by the plaintiff. In the first exception the counsel for the defendant "prayed the court to direct the jury, that if they shall believe from the evidence, that after having replevied and appraised the property mentioned in the schedule returned with the writ, *Lusby*, the defendant, told *Hayes*,

In the execution of a writ of replevin, the sheriff must deliver to the plaintiff all the goods replevied, and a symbolical delivery is not sufficient, unless with the consent of the plaintiff; and whether or not the plaintiff did so consent is a question of fact for the jury.

If a sheriff makes a return of process in a particular manner, with the consent and approbation of the plaintiff, whether the return be true or false, the plaintiff cannot sustain an action for a false return against the sheriff.

A return made by a sheriff to a writ of replevin, that the goods were replevied and delivered, is *prima facie* evidence that the goods were replevied and delivered according to the return; and a letter from the sheriff to the plaintiff saying he would be security for the future delivery of the goods, cannot be considered as having the double capacity of disproving the *prima facie* evidence arising from the

(a) They cited *Gilb. on Distresses*, 281. 1 *Phill. Evid.* 123, 313. 1 *East*, 244. 11 *East*, 298.

sheriff's return, and establishing a *prima facie* case, that the goods were not then delivered

JUNE 1823. the plaintiff, that he had done, and tendered him a chair as part, and that *Hayes* knew the articles replevied, but did not at the time demand a delivery of the other articles, it amounts to a delivery of the whole, and that this action cannot be supported, notwithstanding the agreement of *Lusby* that he would be security for *Etherington's* future delivery of the property." The court instructed the jury as prayed by the defendant; to which the plaintiff accepted.

Hayes
v.
Lusby

This court are of opinion, that the court below ought not to have given such a direction to the jury. The writ enjoins the sheriff to replevy and deliver the goods; and in the execution of this process he may call to his aid the power of the county, if necessary; but if a symbolical delivery of the goods should be considered as an execution of the process, the writ would fail in many instances to be an effective remedy, as the plaintiff could not gain the actual possession of the goods where the defendant, or any other person, chose to resist him. And the circumstance, that the plaintiff, in the replevin, could identify the goods replevied, can make no difference in the case. That the plaintiff may consent to consider a symbolical delivery, as an effective execution of the process, cannot be questioned; but whether the plaintiff did so assent, was a fact to be tried by the jury; and the circumstance that the plaintiff did not, at the time of replevying, demand a delivery of all the goods, may, in connexion with other evidence, in the view of a jury, amount to proof of such assent; but the court below must have considered the omission of the plaintiff to demand the delivery of the other chattels, (if they attached any weight to this proof,) as amounting to a dispensation of the actual delivery. This was a question of fact to be tried by the jury, and by them alone; and as the inquiry was not submitted to them, we are of opinion that the court erred in giving the direction which is the subject of this exception.

In the second exception, the counsel for the plaintiff prayed the court to direct the jury, that unless they believe the property mentioned in the declaration was delivered by the defendant to the plaintiff, or that the plaintiff agreed to take upon himself the responsibility of its remaining in *Etherington's* hands, (who was the defendant in the replevin,) they must find for the plaintiff. The court

JUNE 1823.

Hayes
vs
Lusby

below refused to give the instruction as prayed, but proceeded to give other instructions to the jury; and as the plaintiff excepted only to the refusal of the court to grant his prayer, we cannot inquire into the legal soundness of the instructions which the court did give. And we are of opinion, that the court acted correctly in not granting the prayer of the plaintiff. It must be borne in mind, that the issue before the jury was this, did the defendant make a false return to the writ, contrary to the duty of his office? If he made the return with the consent and approbation of the plaintiff, be that true or false, the plaintiff cannot sustain an action to be repaired in damages, on the ground that the return was false. He is estopped from setting up the fact, *volenti non fit injuria*. Now, if there was any testimony before the jury from which they might infer the fact; that the plaintiff did consent that the sheriff should make the return which he did make, the court below were right in refusing the prayer of the plaintiff, which was based solely and exclusively on the ground that the jury *must* find a verdict for the plaintiff, unless they believed that the defendant *did* deliver the property mentioned in the declaration, or that the plaintiff agreed to take upon himself the responsibility of its remaining in *Etherington's* hands. And the court think, that the question, whether the plaintiff did assent to this return, was fairly open before the jury on the testimony in the bills of exceptions; the court, therefore, on this exception, affirm the judgment of the court below.

We also think that there is no error in the third exception: The court, on the prayer of the defendant, instructed the jury, that the return of the sheriff was *prima facie* evidence that the goods were replevied and delivered, according to the return to the writ. The plaintiff then prayed the opinion of the court, and their instruction to the jury, that the letter written by the defendant to the plaintiff on the 22d of September 1818, and which had been before given in evidence, was *prima facie* evidence that the goods had not, at the date of the letter, been delivered; which opinion the court refused to give. This letter, in connection with other circumstances detailed in evidence, might, or might not, induce the jury to believe that the goods had not been delivered at the time of writing the letter, but standing alone, it cannot be considered as having the dou-

JUNE 1823. ble capacity of disproving the *prima facie* evidence arising from the sheriff's return, and establishing a *prima facie* case, that the goods were not then delivered.

Seegar
vs
The State

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

COURT OF APPEALS, (E. S.) JUNE TERM, 1823.

SEEGAR'S EX'RS. *vs.* THE STATE, use of SENEY'S ADM'R.

Whether or not an action can be maintained on a testamentary or administration bond by a creditor of the deceased, before a *non est inventus* on a *capias ad respondendum* be returned against the executor or administrator, or a *feri facias* returned *nulla bona*, &c?

APPEAL from *Queen-Anne's* county court. An action of debt was brought on the administration bond, dated the 24th of December 1808, given by *Ann Benton* on the estate of *Mark Benton*, deceased. The defendants, (the present appellees,) as executors of *T. Seegar*, one of the sureties in that bond, pleaded *general performance*. On the part of the state non-performance was replied, and the breach assigned was the nonpayment of £130 13s 9d, due to *J. Seney*, deceased, (whose executors prosecuted this action,) as his distributive share of his father's estate, upon which *M. Benton* administered. To this replication there was a general demurrer, and a joinder in demurrer. The county court overruled the demurrer, and gave judgment for the plaintiff; from which judgment the defendants appealed to this court:

The cause was argued at the last June term, before CHASE, Ch. J. BUCHANAN, MARTIN, and STEPHEN, J.

Chambers and *Harrison*, for the appellants, relied on the act of 1720, ch. 24.

Carmichael, for the appellee, cited 5 *Com. Dig.* 230.

JUDGMENT REVERSED.

COURT OF APPEALS, (E. S.) JUNE TERM, 1823. JUNE 1823.

WHITTINGTON vs. THE FARMERS BANK OF SOMERSET AND WORCESTER.

Whittington
vs.
Farmers Bank, &c

APPEAL from Worcester county court. This was an action of *assumpsit*, brought in the names of *The President and Directors of the Farmers Bank of Somerset and Worcester*, (now appellees,) against *Whittington*, (the appellant,) as the indorsor of a promissory note drawn on the 25th of February 1818, by *R. J. H. Handy*, and payable 60 days after date to *J. C. Handy*, or order, for \$5790, and endorsed by *J. C. Handy* to the appellant, or order, and by the appellant endorsed to the appellees. The note was made negotiable at *The Farmers Bank of Somerset and Worcester*, and payable at the house of *J. P. Driffeld*, in the town of *Snow Hill*. The declaration was in the usual form, stating the manner in which the note was drawn, and the endorsement thereof by *J. C. Handy* to the defendant,

No dilatory plea can be received after the rule day unless the fact upon which it is founded occurred subsequent to the rule day.

The handwriting of the drawer and endorsers of a promissory note being proved, the note may be read in evidence without proof of its having been protested.

The protest of a promissory note is not evidence of itself in chief of the fact of a demand on the drawer. If the notary public was dead, the case would be governed by different considerations.

It is no objection to a protest, which is stated to have been made at the request of *The Farmers Bank of Somerset and Worcester*, instead of *The President, &c.* the corporate name.

Parol evidence is admissible to prove that a written order entered among the proceedings of the board of directors of a bank, was rescinded and annulled, by a subsequent verbal order, of which no minute in writing was made.

The parol proof of such verbal order need not establish the fact that the order was rescinded by the board of directors at a regular meeting of the board at the ordinary place of meeting, consisting of the president, and not less than the number of directors, required by the charter for transacting the ordinary business of the bank—nor need such parol testimony show the day and year on which the order had been rescinded.

In an action on a promissory note endorsed to a bank, the defendant cannot set off against the claim of the bank any stock he may have therein.

The general issue being pleaded, the plaintiffs are not bound to show that they are a body corporate.

The defendant cannot retain in his hands the amount specified in the promissory note on which the action is brought by the bank, although the bank may have in its possession money, dividends of stock, or other profits of the bank, to the same or greater amount, belonging to the defendant; he can only claim to have deducted from the note, money or other funds in the possession of the bank belonging to him.

He has a right to avail himself of any fraud, mistake or imposition, practised on him as an individual; but he cannot, as a stockholder, claim an allowance in an action against him by the bank as the endorser of a promissory note, for any mismanagement of the president and directors of the bank.

Evidence that there was not a sufficient number of directors of the bank present at the time of making a certain order, competent to transact business of that description, and that funds had been withdrawn from the bank under that order, when the charter required a greater number of directors, whereby the defendant, as a stockholder, had been deprived of a dividend on his stock, &c.—*Held*, that the evidence was inadmissible.

The defendant, in order to show that there was money in the bank on which he was entitled to a dividend, and which should be credited against the claim of the bank, proposed the following question to the cashier of the bank, viz. "You say that this bank is insolvent, specify some particular creditor, and say what is the evidence of the amount of his debt?" for the purpose of showing whether the claimants, or alleged creditors, were genuine or spurious, or were satisfied, &c. *Held*, that the question was improper to be answered.

The court refused to direct the jury that the testimony of a witness was insufficient and not competent in law, on account of its vagueness and uncertainty, to prove the rescinding of an order adopted by the board of directors.

The defendant may set off against the claim of the bank, any money he has in the bank, or any dividends or profits declared by the bank to be due to him as a stockholder; but he cannot be allowed for the value of his stock; and the court refused to direct the jury, that money illegally drawn from the bank is to be considered to be in the vault of the bank, for the benefit of the stockholders and creditors of the bank, &c.

The court refused to direct the jury, that if the defendant was entitled to stock in the bank, and that the funds of the bank are solvent, and there would be a surplus to be applied to the stockholders, they were bound in assessing damages, to admit the true value of such stock as a set off against the claim of the bank. Also, that unless it is proved that the funds of the bank are insufficient to pay the debts of the bank, the jury are to presume that the funds are sufficient to discharge, as well the debts and claims against the bank, as all stockholders, &c. Also, that if it appeared to the jury to be true that the preamble to a supplement to the act of incorporation of the bank, contains suggestions of matters and things not true, and that the president or directors did not apply for or give their consent to the said supplementary act, that then it was obtained through fraud, &c. and is unconstitutional, null and void.

JUNE 1823.
 Whittington
 vs
 Farmers Bank, &c

and that he endorsed the note, "his own proper hand being thereon subscribed, and by that indorsement appointed the contents of the said note to be paid to *the said Farmers Bank of Somerset and Worcester*, or its order, for value of it received," &c. The declaration averred, that on the 29th of April 1818, at the house of *J. P. Duffield*, in the town of *Snow Hill*, the said *Farmers Bank of Somerset and Worcester* presented the note, with the endorsements made thereon, to *R. J. H. Handy*, and requested payment, &c. and on the same day at the said house gave notice by *S. H.* the proper servant for that purpose of the said *Farmers Bank*, &c. that the said note had become due, and exhibited the said note, &c. and inquired for the defendant for the purpose of demanding payment, &c. The defendant having been ruled to plead, at the third term after the action was brought, viz. May term 1822, "suggested to the court that there is no plaintiff in court, and that the corporation known by the name and style of *The President and Directors of the Farmers Bank of Somerset and Worcester*, is dissolved and dead, and that there is no such body corporate in being; and the said *Whittington* saith, that the said writ and declaration, and the matters therein contained, are not sufficient in law to compel him to answer to the said writ and declaration, to which said writ and declaration the said *Whittington* is under no necessity, nor in any wise bound by the law of the land to answer. And the said *Whittington* defends the force and injury when, &c. and saith," &c. pleading the general issue, and exhibiting an account in bar, being for 100 shares of stock in the said bank of \$5000, and the profits and dividends thereof. Issue was joined.

1. The defendant, on the third day of the court, (May term 1822, being the third term after the action was brought,) made a suggestion upon the record, that there is no plaintiff in court, and that the corporation, which appears as plaintiff, is dead, and that there is no party in court authorised to act as attorney for the said nominal plaintiff; and offered to prove the same by the charter, and proceedings in the said bank, and acts of assembly. But the court, [*Martin*, Ch. J.] was of opinion, and so decided, that no dilatory plea could be received, unless the fact upon which that dilatory plea was founded occurred subsequent to the

second day of this term, at which time the rule to plead JUNE 1823. expired. The defendant excepted.

2. The plaintiff's at the trial offered in evidence the promissory note mentioned in the declaration, after the signatures of the drawer and endorsers had been proved, to which the defendant objected, on the ground that it did not appear from the note that the same had been protested according to law; which objection was overruled by the court. The defendant excepted.

Whittington
vs
Farmers Bank, &c

3. The plaintiff's, after having read in evidence the promissory note above mentioned, offered in evidence a protest of the said note, made on the 29th of April 1818, at the request of *The Farmers Bank of Somerset and Worcester*, by a notary public. To which the defendant objected, on the grounds that the said protest appears to have been made at the request of *The Farmers Bank of Somerset and Worcester*, instead of *The President and Directors of the Farmers Bank of Somerset and Worcester*. The objection was overruled. The defendant excepted.

4. Evidence having been offered to prove that the following order was entered upon the proceedings of the board of directors of the Farmers Bank of *Somerset and Worcester*, on the 24th of October 1817, to wit: "On motion, Ordered, That a call be made on all the debtors of this institution, of ten per cent, and give a privilege to them to surrender stock of the institution at the rate allowed to stockholders in paying the last instalment, of all or any part of the debts due the institution. This order to operate on all notes becoming due after the first of December next;" which order appearing upon the record of proceedings of the board of directors, and it not appearing from the said record that it had been rescinded at any time subsequent to the 24th of October 1817; and it having appeared in evidence, that the defendant was possessed of 100 shares of the capital of said bank, of the value of \$50 per share, and that he had made a tender to the board of directors to comply with the terms of the order, on the 18th of July 1821, which tender and proposition are as follow: "July 18th, 1821. It is ordered and agreed by this board, that the president and cashier be authorised to settle and adjust the claim of this institution against *W. Whittington*; and if the said *Whittington* has or shall procure stock or notes of this institution, or stock or estate in the pro-

JUNE 1823.

Whittington
vs
Farmers Bank, &c

perty formerly belonging to *The Union Company*, that the same, or any part thereof, shall be accepted and received in discharge of his debt to this institution at par, to the amount thereof, which may be transferred or delivered to the institution." Upon said tender and proposition appears the following endorsement: "Rejected as to the manner of payment." The defendant then moved the court to instruct the jury, that forasmuch as the said order appears upon the proceedings of the said board of directors in writing; and forasmuch as it does not appear in writing, among the proceedings of the said board of directors, that the said order had been rescinded at any time subsequently to the 24th of October 1817, that therefore parol evidence cannot now be introduced to rescind and annul the said written order; and that the defendant is entitled to an allowance of any amount of stock which he may possess in the Farmers Bank of *Somerset* and *Worcester*, as an account in bar against the amount for which this suit is brought, under the said order of the said board, adopted on the 24th of October 1817. Which direction the court refused to give; but were of opinion, and so directed the jury, that if they should believe from the evidence, that the order of the 24th of October 1817 was passed by the president and board of directors, that so long as that order was in force and unaltered, the defendant might tender stock in payment of his debt to the bank; but if the said order was rescinded or annulled by the president and board of directors, consisting of at least five directors and the president, by a parol order, that the president and directors were not compelled to receive the said stock in payment of the defendant's debt, after the rescinding the order as aforesaid. The court were also of opinion, that if there was an order made by the president and directors to rescind the said order of the 24th of October 1817, and no minute in writing or memorandum made of the same, that it may be proved by parol evidence. The defendant excepted.

5. The defendant then moved the court to instruct the jury, that no parol evidence can prove the rescinding of the order of the 24th of October 1817, before mentioned, unless such evidence establishes the fact, that the said order was rescinded by the board of directors at a regular meeting of the said board, at the ordinary place of meet-

ing of the board, consisting of the president and not less than five directors; and also that such parol testimony should show the day and year on which the said order had been so as aforesaid rescinded. Which the court refused to give. The defendant excepted.

6. The defendant then prayed the court to direct the jury, that they should make any deductions or allowance from the amount claimed by the plaintiffs, by reason of any money or funds or stock, which may be in the hands of the plaintiffs, belonging to the defendant; and that the jury shall make deductions from the amount claimed by the plaintiffs of money, funds, stock or credits, belonging to the defendant, in the hands of the plaintiffs. Which direction the court also refused to give; but were of opinion, and so directed the jury, that if they believed from the evidence that the defendant had money or other funds in the hands of the plaintiffs, that they ought to deduct the amount of such money or funds from the plaintiffs' claim; but the defendant cannot, in this action, set off against the claim of the plaintiffs any stock he may have in the Bank of *Somerset* and *Worcester*, unless the jury shall believe from the evidence, that the order of the 24th of October 1817, before mentioned, is still in force, or the said stock was rendered by the defendant to the plaintiffs in payment during the time the said order was in force, and before it was rescinded. The defendant excepted.

7. The defendant then prayed the court to instruct the jury, that under the general issue pleaded in this action, the plaintiffs must show that they are a body corporate. Which instruction the court refused to give. The defendant excepted.

8. The defendant then moved the court to instruct the jury, that although the promissory note given by the defendant, as exhibited in evidence, is evidence of so much money being in his hands or possession as in the promissory note is specified, yet that the defendant may retain the same in equity and conscience, though not at law, provided they were satisfied from the evidence, that the plaintiffs have in their hands or possession, money, dividends of stock, or other profits of The Farmers Bank of *Somerset* and *Worcester*, to the same or greater amount belonging to the defendant; and that the jury should so find their verdict. Which instruction the court refused to give, but were of

JUNE 1823.
Whittington
vs
Farmers Bank, &c

JUNE 1823.

Whittington
vs
Farmers Bank, &c

opinion, and so directed the jury, that if they believe from the evidence that the defendant has money or other funds in the hands of the plaintiffs, they ought to deduct the amount of the same from the plaintiffs' claim in this case. The defendant excepted.

9. The defendant then moved the court to direct the jury, that the defendant, under the plea of *non assumpsit* has a right to avail himself of any fraud, mistake or imposition, practised on him in the transactions of the said bank, whereby it may appear to the jury that the claim of the plaintiffs, as exhibited against him, is unlawful, and to show that nothing in equity and conscience is due to the plaintiffs. Which instruction the court refused to give, because it was in too general terms, and might mislead the jury; but they were of opinion, and so directed the jury, that the defendant has a right in this action to avail himself of any fraud, mistake or imposition, practised on him as an individual, but that he cannot claim an allowance in this case for any mismanagement of the President and Directors, as a stockholder in this bank. The defendant excepted.

10. The defendant then offered to read in evidence the proceedings had before the board of directors of the Farmers Bank of *Somerset* and *Worcester*, at a meeting by them held on the 29th of November 1815, viz. "November 29th, 1815. Present, *John C. Handy*, President, *James Givans*, *James B. Robins*, (qualified,) *John S. Martin*, *E. K. Wilson*. Ordered, that Mr. *Wilson* be requested to attend to the business of this bank in the proposed convention at *Annapolis*. On the 2d, Ordered that the cashier may permit the account of the *Union Company* to run up to the sum of \$5000; after that sum has been drawn by them, interest to be paid until paid up, which is pledged to be paid on or before the 15th of March 1816"—with a view to show that there was not a number of directors present at that time competent to transact business of that description, and that funds had been withdrawn from the bank in consequence of the orders of that day, adopted as aforesaid by the president and four directors, when the charter of incorporation, and the act of assembly under which they acted, required a president and five directors for the transaction of such business. Whereby he alleges that he, as a stockholder, has been imposed on by the

plaintiffs, and deprived of a dividend on the said sum of **JUNE 1823.** \$5000, from the date of the said order to the present time; and that as no dividends have been allowed the stockholders on the said sum, and as the same has been illegally withdrawn from the vaults of the bank, the same should in law be still considered and presumed to be in the vaults of the said bank; and that the jury have a right in this action to make him an allowance of a reasonable dividend on the same, and deduct the same from the plaintiffs' claim. But the court were of opinion, that the said evidence was inadmissible, and refused to let it go to the jury. The defendant excepted.

Whittington
vs
Farmers Bank, &c.

11. The defendant then addressed the following questions to *J. P. Duffield*, a witness introduced and sworn on the part of the defendant, which witness was the cashier of the Farmers Bank of *Somerset* and *Worcester*, to wit: "You say that this bank is insolvent, specify some particular creditor, and say what is the evidence and the amount of his debt?" for the purpose of showing whether the claimants or alleged creditors were genuine or spurious, or counterfeit claimants or creditors; for upon the introduction of the evidence of their alleged claims, it may appear in evidence that the said alleged claims were either satisfied, or the evidence of the debts might be counterfeit bank notes, and if so, that thereby it would appear that there is money in bank on which the defendant is entitled to a dividend, which should by the jury be carried to his credit against the claim of the plaintiffs. To the answering of which questions the plaintiffs objected; and which objection was sustained by the court. The defendant excepted.

12. The defendant then moved the court to instruct the jury, that the testimony delivered by *J. C. Handy*, a witness introduced and sworn on the part of the defendant, and who was the President of the Farmers Bank of *Somerset* and *Worcester*, is insufficient, and not competent in law, on account of its vagueness and uncertainty, to prove the rescinding of the order adopted on the 24th of October 1817, (herein before mentioned,) and appearing upon the records of the proceedings of the board of directors. The witness, on being told to repeat the testimony which he had before given upon the subject of rescinding the order adopted at a meeting of the board of directors on the

JUNE 1823.

Whittington
vs
Farmers Bank, &c

24th of October 1817, said as follows: "It was at a meeting of the board, the day or particular time I do not recollect, the order was rescinded, and directions given to me to give notice to the proper officer. There was no memorandum in writing, that I recollect, and I do not remember whether that meeting of the board of directors was a regular or special meeting—whether the meeting of the board of directors was called by me as president; or the number of directors that were present." Which instruction the court refused to give. The defendant excepted.

13. The defendant then moved the court to instruct the jury, that whatever money has not been drawn out of the Farmers Bank of *Somerset* and *Worcester*, agreeably to the charter of incorporation, the legal by-laws of the institution, the laws and constitution of this state, and the constitution of the *United States*, is to be considered and presumed to be in the vault of the said bank, for the benefit of the stockholders and creditors of the said bank; and that the jury has a right to apply as much thereof as belongs to the defendant, either as a stockholder, individual, or creditor of the said bank, as will bar the claim exhibited against him by the plaintiffs. Which instruction the court refused to give, being apprehensive it would mislead the jury; but were of opinion, and so directed the jury, that the defendant may set off any money he has in the hands of the plaintiffs, or any dividends or profits declared by the president and directors to be due to him as a stockholder; but that he cannot be allowed for the value of his stock in this action, unless the jury shall believe from the evidence, that the order of the board of directors of the 24th of October 1817, is still in force, or that he tendered the said stock in payment of his debt before the said order was rescinded; or that he tendered notes of the bank in payment. The defendant excepted.

14. The defendant then produced evidence that he was entitled to 100 shares of the capital stock of the Farmers Bank of *Somerset* and *Worcester*, and that he had fully paid up and satisfied to the president and directors of the said bank, the sum of \$50 on each share of the said bank stock, conformable to the rules, regulations and by-laws of the said corporation, and agreeably to the original act of incorporation. He further offered in evidence the act of

assembly, entitled, "An act for the benefit of the Farmers Bank of *Somerset* and *Worcester*, and the *Salisbury* branch," passed at December session 1820, *ch.* 116, whereby the said corporation is declared no longer capable of discounting bills, drafts or notes, but is by the said law required to close the concerns of the said bank, and to make dividends of the profits among the stockholders of the same institution every two months. He further offered evidence, to prove that the joint property of the said bank, as connected with the branch bank at *Salisbury*, was amply sufficient to pay and satisfy all claims and demands whatever as debts due and owing from the said institution. Upon this evidence the defendant moved the court to instruct the jury, that if, from the evidence thus exhibited to them, they should be satisfied that the defendant was entitled to 100 shares of the capital stock of the said bank, and that the joint funds of the said banks are good and solvent, and capable of paying the creditors of the said institutions; and that after paying all debts and claims to which said institutions were liable, there would be a considerable surplus, which ought to be applied to the benefit of the stockholders, that then and in that case the jury were bound in law, and it was their duty in assessing damages, to admit the true value of such stock as a set off against the plaintiffs' claim. Which instruction the court refused to give. The defendant excepted.

15. The defendant then moved the court to direct the jury, that if they should, from the evidence exhibited, believe that the defendant was entitled to 100 shares in the capital stock of the said company, and that the stockholders of the said bank had accepted the provisions of the act of assembly, entitled, "An act for the benefit of the Farmers Bank of *Somerset* and *Worcester*, and the *Salisbury* branch," passed at December session 1820, *ch.* 116, and had acted and proceeded to collect the debts, and pay off the creditors of the said institution, agreeably to the terms of the said act of assembly, that then and in that case, if the plaintiffs do not by competent evidence show that the joint funds of the said corporation are insufficient to pay the whole debts of the said corporation, they have a right, and ought to presume that the joint funds are sufficient to discharge, as well the debts and claims against the said institution, as all stockholders in the said bank; and they are

JUNE 1823.

Whittington
vs
Farmers Bank, &c

JUNE 1823. bound in assessing damages to admit as a set off the full amount of capital stock held by the defendant at the just value thereof. Which instruction the court refused to give. The defendant excepted.

Whittington
vs
Farmers Bank, &c

16. The defendant then stated, that by the original act of incorporation of the said bank, passed at November session 1811, *ch.* 193, it is, in the *sixth* section of that act, enacted as follows: "And be it enacted, That the affairs of the said bank shall be managed by sixteen directors and a president, eight of the directors to be resident in *Worcester* county, and eight in *Somerset* county." He further stated, that the preamble of the act of 1820, *ch.* 116, is as follows, viz. "Whereas it has been deemed advantageous by the stockholders of the Farmers Bank of *Somerset* and *Worcester*, and the *Salisbury* Branch Bank, that the affairs of the banks should be settled, and the corporation dissolved, and to that end hath petitioned the legislature of *Maryland*;" and this preamble, he alleges, contains a suggestion of matters and things not true; and he alleges, that neither the president nor directors did apply or give their consent to the changes made in the said act of incorporation by the said act of 1820, *ch.* 116; and he further states and alleges, that it was not deemed advantageous by the stockholders of the Farmers Bank of *Somerset* and *Worcester*, or by the stockholders of the *Salisbury* branch bank, that the said change or reduction of the number of directors, from sixteen to seven, should be made, nor were they ever consulted or advised upon the subject, nor did they ever prefer a petition to the legislature for that purpose; and that the last mentioned act was passed without their consent first had and obtained according to law. If these statements, allegations and suggestions, should appear to the jury to be true, from the evidence introduced in the case, then and in that case the defendant contends, that the said act was obtained through fraud, imposition and surprise, and is void. The defendant then moved the court to instruct the jury, that the said last mentioned act of assembly is unconstitutional, null and void; and if so, that the present action cannot be sustained, it having been brought by virtue of the said act of assembly of 1820, *ch.* 116; and they are bound to find a verdict for the defendant. Which instruction the court refused to give. The defendant ex-

cepted. The verdict and judgment being in favour of the plaintiffs, the defendant appealed to this court.

JUNE 1823.
Whitington.
vs
Farmers Bank, &c

The cause was argued before BUCHANAN, EARLE, DORSEY, and STEPHEN, J. by

The Appellant in person, and by

Chambers, for the appellees.

The opinion of the court was delivered by

DORSEY, J. This court concur with the court below in the opinions expressed by them, in the 1st, 2d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th bills of exceptions; but they differ from the court below, in permitting the protest, set out in the *third* bill of exceptions, to go to the jury. We hold it to be clear, that the protest of a promissory note is not evidence of itself in chief of the fact of demand; and as there is no parol proof of a demand set forth in the exception, it is difficult to conceive that the protest was produced for any other purpose than proving a demand on the drawer. If the notary public had been dead, and this fact appeared by the record, the case would have been governed by different considerations. We are of opinion that the judgment of the court below must be reversed.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

NOTE.

IN the case of *The State vs. Buchanan, et al.* ante 368, a *Procedendo* was ordered to Harford County Court for a new trial; and in that Court at August term 1822, *George Williams*, one of the traversers, appeared, and offered ready for trial, claiming a right to be tried separately from the two other traversers. The court decided that the parties in such an indictment had a right to be tried separately; and that, as the other traversers were not then before the court, *Williams* might insist on having his trial immediately, unless the Attorney General could show sufficient ground for a continuance. This was done, by showing the absence of a material witness, who had been summoned; and the case was continued to March term 1823. At that term, *Williams* did not attend in person, being confined by sickness; but *Buchanan* and *M. Culloh* appeared, and pleaded not guilty, and put themselves upon the court for trial, instead of the jury, under the act of 1809, *ch.* 144, which act enables all persons presented or indicted, for any offence whatever, to transfer their trials from the jury to the court, on the plea of not guilty, and authorises the court to decide on the whole merits of the case. After the examination of a number of witnesses, and hearing the counsel on the part of the state, and of the traversers, a majority of the court, [*Hanson* and *Ward*, A. J.] decided, that the traversers were not guilty *in law or in fact*, and that a judgment of acquittal must be entered. *Dorsey*, Ch. J. was of a different opinion. *Williams* afterwards appearing, pleaded not guilty, and put himself upon the court for trial. He was acquitted as a matter of course, because one person alone cannot be guilty of a conspiracy; and as the other two were acquitted, he alone remained under the indictment. And it is said in "*A Report of the Conspiracy Cases*," (published by the bank of the U. S.) from which this statement is taken, that "justice to him requires it to be stated, that he did not appear, from any part of the evidence, to have had any agency in the transactions with which his name was connected," &c. That "the counsel for the prosecution took occasion to declare, that his case had been viewed by them from the first, in a much more favourable light than that of the other traversers," &c. "It is therefore highly probable, that had he been put on his trial, he would have been acquitted on the merits of the case."

INDEX

TO THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.



A.

ABANDONMENT.

See Insurance 1, 2, 3, 4, 10.

ABATEMENT.

1. In a court of general jurisdiction, the personal disability of the plaintiff to sue, can only be taken advantage of by a plea in abatement. *Shivers v. Wilson, Garn of Walker et al.* 130
See Injunction 2.

ACCUMULATIVE REMEDY.

See Way 3.

ACKNOWLEDGMENT.

See Admission 1.

ACKNOWLEDGMENTS OF DEEDS

1. Where a deed was recorded within time, and the year when it was acknowledged was omitted in the acknowledgment, the legal inference is that it was legally acknowledged. *Wickes's Lessee v Caultk,* 36

ACQUIESCENCE.

See Jurisdiction 3.

— Way 4, 5, 7.

ACTION.

1. An action would lie against the state under the act of 1786, *ch* 53, for all description of claims against the state. *The State v Chase,* 297
See Assault and Battery 2.
— Cestui Que Use 1, 2, 3.

See Corporations 1.

— Insolvent Debtors 5, 7.

— Joint Assault and Battery.

ACTION ON THE CASE.

1. If a contract with an overseer be to give him a certain stipulated sum, and to furnish him with certain quantities of produce, the value of the produce, or damages for its nondelivery, cannot be recovered in an action of general *indebitatus assumpsit*, but the whole may be recovered in a special action on the case. *Coursey v Corington,* 45
2. An action on the case in nature of waste, can only be brought by a reversioner or remainder-man in fee simple, fee tail, for life or for years. *M. Laughlin v Long,* 113
See Way 1, 8.

ACTS OF ASSEMBLY.

Certain acts of assembly construed or explained, &c.

- 1715, *ch* 40. (Attachment) 312
— *ch*. 44. (Negroes and Slaves.) 190
1717, *ch*. 13. (Servants and Slaves.) 51
1718, *ch*. 18. (Bounds of Lands) 36
1752, *ch*. 1. (Manumission of Slaves.) 310
1763, *ch*. 23. (Assignment of Judgment) 234
1774, *ch*. 28. (Insolvent Debtors.) 181, 369
1777, (Feb) *ch*. 8. (Plenary Proceeding) 175

- 1785, *ch.* 49. (Private Roads.) 467
 — *ch.* 87. (Appeals) 232
 1786, *ch.* 45. (Descent.) 23, 459
 — *ch.* 53. (Actions against the State) 297
 1790, *ch.* 42. (Proceedendo) 267
 1794, *ch.* 46. (Inquiry at bar.) 1, 8
 1795, *ch.* 56. (Attachment.) 130, 312
 1796, *ch.* 67. (Negroes and Slaves.) 86, 190, 232
 1798, *ch.* 101. (Females. Plenary Proceeding. Appeal) 101, 175
 1804, *ch.* 51. (Turnpike Road Companies.) 84
 1805, *ch.* 65. (Chief Judge to give his opinion, &c. to the Chancellor.) 297
 — *ch.* 86. (Salaries to the Judges) 297
 — *ch.* 110. (Insolvent Debtors.) 403
 1806, *ch.* 55. (Chief Judge to act as Chancellor) 297
 1809, *ch.* 138. (Penitentiary System) 125
 1811, *ch.* 189. (Chief Judge to act as Chancellor.) 297
 1813, *ch.* 138. (Hager's-town Turnpike Company.) 122
 1816, *ch.* 221. (Insolvent Debtors of Baltimore.) 403
See Construction 1.

ADJACENT.

- I. The *thirty third* section of the act of 1804, *ch.* 51, providing that no person "living on or adjacent to a turnpike road, within three miles of any of the gates or turnpikes, shall pay for passing the said gate more than once in 24 hours, applies only to those persons who reside on premises which lie on and touch the road, and are within three miles of a turnpike gate" *Owings v The Balt. and Reister's Town, &c.* 84

ADMINISTRATION BOND.

- I Whether or not an action can be maintained on an administration or testamentary bond by a creditor of the deceased, before a *non est inventus* on a *capias ad respondendum* be returned against the executor or administrator, or a *fiat facias* returned nullum bona? *Quere* *Sergar's Ex'rs v The State use of Seney's Adm'r.* 488
See Limitation of Actions 3.

ADMINISTRATOR.

- See* Executor and Administrator.
 — Freedom 2.

ADMISSIONS.

- I. The admissions of the executor or administrator of a co-obligor, are

- not evidence against the surviving obligor in an action against him by the obligee. *Walmer v Harris,* 1
 2. The admissions of one partner, after the partnership is dissolved, are not sufficient to charge the other partners with a debt, but are sufficient to take a debt due from the partners, out of the statute of limitations. *Ward v Howell, et al.* 60
See Evidence 35.

ADVANCEMENT.

- See* Court of Chancery 18.
 — Hotchpot.

ADVERSARY POSSESSION.

- See* Ejectment 5.
 — Limitation of Actions 2.
 — Possession 3.
 — Way 4, 5, 7.

AFFIRMANCE.

1. If the judges of the appellate court are equally divided in opinion, the judgment of the inferior court must be affirmed. *Hammond v Ridgely's Lessee,* 284

AGENT.

- See* Commission Merchants.
 — Principal and Agent.
 — Statute of Frauds 1, 2, 3.
 — Trustee F 2 3.

AGREEMENT.

- I. A and B were endorsors of a promissory note drawn by C, who became unable to take it up. Being by a prior understanding between them equally liable for C, they took up the note by giving their own, which was drawn by A, payable to, and endorsed by B, with an agreement that each should pay one half of the note so given, when it became due. The note was protested for non-payment, and A paid the whole of it, principal, interest, and cost of protest. *Held,* that A might recover from B one half of the money thus paid, in an action of general indebitatus assumpsit, and that it was not necessary to declare on the special agreement between them. *Morris v Wills,* 120

See Contract.

- Covenant 1.
 — Grant 14.
 — Parol Agreement 1.
 — Way 6, 9.

ALLEGATION.

- See* Attachment 3, 4.

ALLOTMENT.

See Descents 2.

AMBIGUITY.

See Grant 2, 16, 21.

AMENDMENT.

The record of a deed recorded in the records of the late Provincial court in 1737, corrected by the court of appeals so as to make it conformable with the original *Frazier, et al Lessee v. Hall*, 437 (note.)
See Answer in Chancery, and Court of Chancery 18
— Ejectment 9, 10.

ANSWER IN CHANCERY.

1. An answer responsive to a bill, is evidence, but only entitled to the same weight that parol evidence is entitled to *Jones v. Slakey*, 372
2. An answer alleging declarations or intentions at variance with the expressed intention of a deed, cannot create a trust for the benefit of a third person, and defeat a complainants' equity. *Ib.*
3. If an answer to a bill for the specific performance of a parol agreement, admits the agreement, and does not rely on the statute of frauds, the agreement will be enforced against the defendant. *Ib.*
See Court of Chancery 9, 12, 18.

APPEAL.

1. The refusal of an inferior court to grant a new trial cannot be assigned for error. *Anderson v. The State*, 174
2. An appeal will lie from any decision of the orphans court—as where that court refused to direct a plenary proceeding, &c *Barroll & Cannell v. Reading*, 175
3. For error apparent on the face of the record in such criminal cases as are enumerated in the act of 1785, ch. 37, s. 6, there may be an appeal. *Queen v The State*, 232
4. An appeal lies from a judgment of the county court quashing a ca. sa. *Wilmer v Harris*, 2 (note.)
See Court of Appeals.
— Writ of Error.

ARREST.

See Insurance 10.

ARSON.

1. The fifth section of the act of 1809, ch. 138, punishes the burning of a barn, whether it contains the articles

of personal property mentioned in that section, or other articles. *House v House*, 125

2. The word *empty*, mentioned in that section, is used only to distinguish a barn, having the articles therein enumerated, from one that has not, and was not intended to mean a barn *entirely empty*. Every barn not containing said enumerated articles is in the meaning of said section an *empty barn*. *Ib.*

ASSAULT AND BATTERY.

1. Whether or not the defendant in an action of assault and battery has supported his plea of *son assault demesne*, is for the consideration of the jury on the evidence. *Barnes v. Gray*, 436
2. If on a joint assault and battery the plaintiff severs his actions, all the facts accruing at the time of the assault and battery may go to the jury, at the trial of either of the actions. *Ib.*

ASSIGNMENT.

See Mortgage 1.

— Principal and Surety 4, 5, 6, 7, 10.

ASSUMPSIT.

1. Where there is a special contract not under seal, for labour or service, and it has been fully executed, *indebitatus assumpsit* lies for the sum stipulated by the contract. *Coursey v Covington*, 45
2. If a contract with an overseer be to give him a certain stipulated sum, and to furnish him with quantities of produce, the value of the produce or damages for its non delivery, cannot be recovered in an action of general *indebitatus assumpsit*, but the whole may be recovered in a special action on the case. *Ib.*
3. When the entire contract is to deliver certain quantities of produce, an action of general *indebitatus assumpsit* cannot be sustained to recover the value of such produce, or damages, for its non delivery. *Ib.*
4. Where the defendant agrees with the plaintiff to pay him, as overseer, a certain sum, and a certain amount of produce, and the plaintiff declares only for the money, he is not entitled to recover the value of the produce. *Ib.*
5. A plaintiff may recover less than he demands, but not more. *Ib.*

6. A and B were endorsors of a promissory note drawn by C, who became unable to take it up. Being by a prior understanding between them equally liable for C, they took up the note by giving their own, which was drawn by A payable to and endorsed by B, with an agreement that each should pay one half of the note so given when it became due. The note was protested for non-payment, and A paid the whole of it, principal, interest and cost of protest. *Held* that A might recover from B one half of the money thus paid, in an action of general *indebitatus assumpsit*, and that it was not necessary to declare on the special agreement between them. *Morris v. Wills*, 120

7. A declaration of general *indebitatus assumpsit* must set out the cause or consideration upon which the debt accrued. *Chandler v. The State*, 284

8. A contract for a fixed salary, and an implied *assumpsit* cannot stand together. *Ib.*

9. No judicial services performed by a judge, with a fixed salary, can furnish any foundation from which an *assumpsit* on the part of the state can be implied. *The State v. Chase*, 297

See Bankrupt 1, 2.

— Office & Officer 1, 2.

ATTACHMENT.

1. The act of 1795, *ch. 56*, regulating the manner of issuing attachments, is limited in its operation, and nothing done under it is valid, unless its provisions are substantially complied with. *Shivers v. Wilson, garn v. Walker, et al.*, 130

2. No one can issue an attachment under that act but a citizen of this state, or of some other state of the *United States*. *Ib.*

3. A person may be a citizen of the *United States*, and not a citizen of any one state of the *United States*—an allegation therefore, that the party suing out an attachment is a citizen of the *United States*, is not sufficient, it must appear by the proceedings that he is a citizen of this state, or of some state of the *United States*. *Ib.*

4. The proceedings under the act of 1795, *ch. 56*, must not only show that the party suing out the attachment is a citizen of this state, or of some other of the *United States*, but when the garnishee appears and pleads *non assumpsit*, &c. by the defendant, the plaintiff must at the trial

prove himself to have been at the time of issuing the attachment, a citizen of this state, or of some other of the *United States*. *Ib.*

5. The interest which a mortgagor had in lands mortgaged by him, was before the acts of 1795, *ch. 56*, and 1810, *ch. 160*, liable to be attached, condemned, and sold under a *fieri facias*. *Ford, et al v. Philpot, et al.*, 312

6. Whether or not an attachment on judgment can issue to a different county from that in which the judgment was rendered, although a *fieri facias*, issued to the proper county, had been returned *nulla bona*? *Quere. Harding v. Hull & Tyson, garnishees of Boyle*, 478

See Attorney at Law.

— Evidence 40, 41.

ATTESTATION.

1. Under the act of assembly of Delaware, 1797, *ch. 124*, a deed of manumission, to be valid, must be attested by the subscribing witness in the presence of the grantor, though it is not necessary that that fact should appear by the certificate of the attestation itself; it may be proved by evidence *aliunde*. *Negro Clara v. Meagher*, 111

See Conveyance 1, 2.

— Codicil 1.

— Will 3.

— Witness 1.

ATTORNEY AT LAW.

Where an attorney of the court appeared for garnishees summoned on an attachment, &c. the court would not strike out the appearance of such attorney, although he had not been authorised by the garnishees to appear for them, and they did not intend to contest the attachment. *Harding v. Hull & Tyson, garnishees of Boyle*, 478

ATTORNEY GENERAL.

See Writ of Error 5.

AUTHORITY.

See Execution 1

— *Fieri Facias* 2.

— Jurisdiction 1, 2, 3.

— Special Authority.

B.

BAIL.

See Special Bail.

BANK.

1. It is no objection to a protest of a promissory note, which is stated to have been made at the request of *The Farmers Bank of Somerset and Worcester*, instead of *The President*, &c. the corporate name *Whittington v The Farmers Bank, &c.* 489
2. Parol evidence is admissible to prove, that a written order entered among the proceedings of the board of directors of a bank, was rescinded and annulled, by a subsequent verbal order, of which no minute in writing was made. *Ib.*
3. — The parol proof of such verbal order need not establish the fact that the order was rescinded by the board of directors at a regular meeting of the board at the ordinary place of meeting, consisting of the president, and not less than the number of directors required by the charter for transacting the ordinary business of the bank—nor need such parol testimony show the day and year when the order was rescinded. *Ib.*
4. In an action on a promissory note endorsed to a bank, the defendant cannot set off against the claim of the bank any stock he may have therein. *Ib.*
5. The general issue being pleaded, the plaintiffs are not bound to show that they are a body corporate. *Ib.*
6. The defendant cannot retain in his hands the amount specified in the promissory note on which the action is brought by a bank, although the bank may have in its possession money, dividends of stock, or other profits of the bank to the same or greater amount belonging to the defendant; he can only claim to have deducted from the note, money, or other funds in the possession of the bank belonging to him. *Ib.*
7. — He has a right to avail himself of any fraud, mistake or imposition, practised on him as an individual; but he cannot, as a stockholder, claim an allowance in an action by the bank against him as the endorser of a promissory note, for any mismanagement of the president and directors of the bank. *Ib.*
8. Evidence that there was not a sufficient number of directors of the bank present at the time of making a certain order, competent to transact business of that description, and that funds had been withdrawn from the bank under that order, when the charter required a greater number of directors, whereby the defendant, as a stockholder, had been deprived of a dividend on his stock—*Held*, that the evidence was inadmissible. *Ib.*
9. The defendant, in order to show that there was money in the bank on which he was entitled to a dividend, and which should be credited against the claim of the bank, proposed the following question to the cashier of the bank, viz. "You say that this bank is insolvent—specify some particular creditor, and say what is the evidence of the amount of his debt? for the purpose of showing whether the claimants, or alleged creditors, were genuine or spurious, or were satisfied, &c." *Held*, that the question was improper to be answered. *Ib.*
10. The court refused to direct the jury, that the testimony of a witness was insufficient, and not competent in law, on account of its vagueness and uncertainty, to prove the rescinding of an order adopted by the board of directors of a bank. *Ib.*
11. The defendant may set off, against the claim of a bank, any money he has in the bank, or any dividends or profits declared by the bank to be due to him as a stockholder; but he cannot be allowed for the value of his stock. And the court refused to direct the jury, that money illegally drawn from the bank is to be considered to be in the vaults of the bank, for the benefit of the stockholders and creditors of the bank, &c. *Ib.*
12. The court refused to direct the jury, that if the defendant was entitled to stock in a bank, that the funds are solvent, and there would be a surplus to be applied to the stockholders; they were bound in assessing damages to admit the true value of such stock as a set off against the claim of the bank. Also, that unless it is proved that the funds of the bank are insufficient to pay the debts of the bank, the jury are to presume that the funds are sufficient to discharge, as well the debts and claims against the bank, as all stockholders, &c. Also, that if it appeared to the jury to be true that the preamble to a supplement to the act of incorporation of the bank, contains suggestions of matters and things not true, and that neither the president nor directors did apply for or give their consent to

the said supplementary act, that then it was obtained through fraud, &c. and is unconstitutional, null and void *Ib.*

BANK OF UNITED STATES.

1. A combination to cheat the bank of the U. S. is an indictable offence in the courts of the state. *The State v. Buchanan, et al.* 360
2. For the purpose of the prosecution the bank is considered as an individual. *Ib.* 362
3. The legislature of the state has no right to pass laws calculated to control or impede the operations of the bank. *Ib.*

See Jurisdiction 7.

BANKRUPT.

1. A promise by a debtor, after his discharge under a bankrupt law, to pay a prior debt, waives the discharge, and the debt is a sufficient consideration for the promise. *Yates's Adm'rs v. Hollingsworth.* 216
2. — The promise must however be express, and if a condition be annexed to it, the condition must be complied with. *Ib.*

BARGAIN & SALE.

See Conveyance 4, 5.

BARON & FEME.

See Husband & Wife.

BASTARDS.

See Illegitimate Children.

BEQUEST.

See Freedom 1, 2, 3.

— Devise 13, 14.

— Husband & Wife 1.

— Widow 1.

BILL.

See Cestui Que Use 1, 2.

— Court of Chancery 1, 2.

— Parties 1.

— Trustee 3.

BILL OF EXCEPTIONS.

1. Can a bill of exceptions be taken in a criminal prosecution for a misdemeanor? *Anderson v The State,* 174
2. A bill of exceptions is not allowed in criminal cases. *Queen v. The State,* 232

BILL OF EXCHANGE.

See Promissory Note.

BILL OF PARCELS.

See Statute of Frauds 1, 2, 3.

BINDING DECISION.

See Court of Appeals 1, 2, 3.

BINDING EXPRESSIONS.

See Grant 7, 22, 23, 24.

BLANK INDORSEMENT.

1. A blank indorsement of a promissory note must be filled up before verdict, or the judgment on it will be bad. *Hudson v. Goodwin,* 115

BLOCKADE.

See Insurance 16.

BOND.

1. An injunction bond is only binding with reference to the judgment it recites, and is a security for the payment of no other judgment than the recited one; as where the judgment recited was stated to have been at April term, 1801, when it was in fact at September term, 1801, it was held that the bond was not liable. *Morgan v Blackiston,* 61
 2. The form of a bond to be executed by the defendant, on a writ of *ne exeat* being served on him, set out. *Cox's Ex'rs v. Scott,* 385
- See Breaches 1, 2, 3.
- Injunction 2.

BOUNDARIES OF LAND.

See Jurisdiction 3.

BREACHES.

1. Where there is a judgment by default in an action on a bond with a collateral condition, there must be breaches suggested, and the damages assessed as directed by the statute of 8 & 9 Wm. ch. 11. *Wilmer v Harris,* 1
 2. If the breaches are stated in the declaration or replication, and there is a judgment for the plaintiff on confession, by *nil dicit*, or on demurrer, they need not be again suggested to enable the jury to assess the damages. *Ib.*
 3. The statute extends as well to bonds with conditions thereunder written, as to covenants contained in another deed. &c. *Ib.* 8
 4. The act of 1794, ch 46, does not repeal any of the British statutes relating to the suggestion of breaches. *Ib.*
- See Covenant 2.

BRITISH STATUTES.

See Statutes.

C.

CALLS.

1. Calls are preferred to course and distance, because they operate most beneficially for the grantee *Carroll, et al. Lessee v Norwood's heirs*, 163
Hammond v Ridgely's Lessee, 255
See Grant 3, 4, 5, 6, 19.

CAPIAS AD SATISFACIENDUM.

1. An appeal lies from a judgment of the county court quashing a *ca sa*.
Wilmer v Harris, 2 (note.)

CAPTURE.

See Insurance 1, 2, 8, 10.

CAUTION MONEY.

See Grant 27.

CERTIFICATE OF SURVEY.

See Evidence 20.

CESTUI QUE USE.

1. Where a bill is filed by an indorsee of a promissory note against the drawer, to vacate a deed, &c. and the debt is subsequently paid by the endorser to the complainant, the suit cannot be carried on for the use of such endorser, but the bill will be dismissed without prejudice. *Heighe et al. v The Farmers Bank*, 68
2. — The endorser may perhaps, by a bill in his own name, afterwards set aside the deed, and recover the amount paid by him to the first complainant, *Ib.*
3. If an action of ejectment is entered for the use of any person, such person is substantially a party to the action. *Hammond v Ridgely's Lessee*, 267

See Principal & Surety 3, 4, 11.

CHANCERY.

See Court of Chancery.

CHARITABLE USES.

1. The peculiar law of charities originated in the statute of charitable uses of 43 *Elizabeth*, ch. 4, and independent of that statute a court of chancery cannot sustain and enforce a devise to charitable uses, which, if not to a charity, would on general principles be void. *Dashiell, et al. v The Attorney General*, 392
2. J C by his will directed the income of his estate to be paid over by his executors to certain trustees, and after making several appropriations of a part thereof, further directed the

residue to be equally divided, one half to be applied towards feeding, &c. the poor children belonging to the congregation of *St Peter's* Protestant Episcopal Church, &c. — Held, that such bequest is too vague and indefinite to be carried into effect, and is therefore void, and that the subject of the trust results for the benefit of the next of kin of the testator. *Ib.*

3. The statute of 43 *Elizabeth*, ch. 4, is not in force in this state. *Ib.*

CITIZEN.

See Attachment 2, 3, 4.

CODICIL.

1. A codicil in the hand writing of the testator, found with his will, reciting the changes and alterations he intended to make in it as to his personal estate, is a good and valid testamentary disposition of such estate, though not signed by him, or attested by witnesses. *Brown's Ex'r. v Tilden, et ux.* 371

COLONISTS.

See Common Law 1, 2.

— Conspiracy 7.

COLLATERAL CONDITION.

See Breaches 1, 2.

COMMISSION AND COMMISSIONERS.

1. The return to a commission to take testimony out of the state, was held to be well executed, although there was no other evidence that the person who administered the oath to the commissioner, was a justice of the peace, than his own act, and the return of the commission. *Walkup v Pratt*, 51
2. Where the return of a commission to take testimony, states that the commissioner took the oath annexed to the commission before A B, the legal presumption is, that A B had authority to administer the oath. *Snively v M. Pherson & Brien*, 150
3. If notice of the execution of a commission be given to the party against whom the evidence taken under it operates, it is sufficient, though no notice was given to the adverse party, *Ib.*
4. The service of copies of the interrogatories, which accompany a commission to take testimony, on the adverse party, a sufficient time before the issuing of the commission, to

enable him to file cross interrogatories, is sufficient notice of the issuing of the commission, and of the time and place of its execution. *Law v Scott*, 438
 See Jurisdiction 3.

COMMISSION MERCHANTS.

See Principal and Agent.

COMMON LAW.

1. Our ancestors brought with them the laws of the mother country, so far at least as they were applicable to their situation, and the condition of an infant colony. They were in the predicament of a people discovering and planting an uninhabited country. And if they brought with them the common law of conspiracy, they brought it as it is now settled and known in *England*. It is to judicial decisions that we are to look for the evidences of the common law. *The State v Buchanan, et al.* 356
 2. The third section of the Bill of Rights has reference to the common law in *mass*, as it existed here, either potentially or practically, and as it prevailed in *England* at that time, except such portions of it as are inconsistent with the spirit of that instrument, and the nature of our new political institutions. *Ib* 358
 3. Precedents do not constitute the common law, but serve only to illustrate principles. *Ib* 357
- See Conspiracy 1, 2, 3, 5, 8.
 — Non User 1.
 — Way 1, 3, 6.

COMPOSITION MONEY.]

See Grant 27.

CONDEMNATION.

See Attachment.

— Insurance 1, 2.

CONDITION PRECEDENT.

See Pleading 4.

CONFEDERACY.

See Conspiracy.

CONFESSION.

See Admission 1.

— Principal and Surety 3.

CONFISCATION.

1. Where land, liable to confiscation, was surveyed under an escheat warrant previous to an application to the executive to purchase it as being liable to confiscation, the grant obtain-

ed on the escheat certificate was held to vest a title to the land in the escheator, although the composition money on the escheat was not paid, and the grant not issued, until after the application to purchase. *Stewart v Donaldson's Lessee*, 428

CONSENT.

See Replevin 1.

— Sheriff 5, 6.

— Verdict 2.

CONSIDERATION.

See Bankrupt 1, 2.

CONSPIRACY.

1. The offence of conspiracy is of common law origin, and not restricted or abridged by the statute 33 *Edward 1. The State v Buchanan, et al.* 317
2. A conspiracy to do any act that is criminal *per se*, is an indictable offence at common law. *Ib*
3. An indictment will lie at common law, 1. For a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only. 2. For a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public. 3. For a conspiracy to extort money from another, or to injure his reputation by means not indictable if practised by an individual, as by verbal defamation, and that whether it be to charge him with an indictable offence or not. 4. For a conspiracy to cheat and defraud a third person, accomplished by means of an act which would not in law amount to an indictable cheat, if effected by an individual. 5. For a malicious conspiracy to impoverish or ruin a third person in his trade or profession. 6. For a conspiracy to defraud a third person by means of an act not *per se* unlawful, and though no person be thereby injured. 7. For a bare conspiracy to cheat or defraud a third person, though the means of effecting it should not be determined on at the time. 8. A conspiracy is a substantive offence, and punishable at common law, though nothing be done in execution of it. *Ib*
4. In a prosecution for a conspiracy, it is sufficient to state in the indictment, the conspiracy and the object of it; and the means by which it

was intended to be accomplished need not be set out. *Ib.*

5. Every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious, or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is at common law an indictable offence, though nothing be done in execution of it, and no matter by what means the conspiracy was intended to be effected; which may be perfectly indifferent, and makes no ingredient of the crime, and therefore need not be stated in the indictment. *Ib.*

6. Our ancestors brought with them the laws of the mother country, so far at least as they were applicable to their situation, and the condition of an infant colony. They were in the predicament of a people discovering and planting an uninhabited country. And if they brought with them the common law of conspiracy, they brought it as it is now settled and known in *England*. It is to judicial decisions that we are to look for the evidences of the common law. *Ib.*

7. The *third* section of the Bill of Rights has reference to the common law in mass, as it existed here, either potentially or practically, and as it prevailed in *England* at that time, except such portions of it as are inconsistent with the spirit of that instrument, and the nature of our new political institutions; and it cannot be inconsistent with, or repugnant to the spirit and principles of our institutions, to correct the morals, and protect the reputation, rights and property, of individuals, by punishing corrupt combinations falsely to rob another of his reputation, maliciously to ruin him in his business, or fraudulently to cheat him of his property. *Ib.*

8. An indictment having two counts, the *first* charging the defendants with an executed conspiracy, falsely, fraudulently and unlawfully, by wrongful and indirect means, to cheat, defraud and impoverish, the President, Directors and Company of the Bank of the *United States*; and the *second* charging them with a conspiracy only, falsely, fraudulently and unlawfully, by wrongful and indirect means, to cheat, defraud and impoverish the President, Directors and Company, of the Bank of the *United States*; where one of

the defendants was the president of the office of discount and deposit of the mother bank, another the cashier of that office, and the other a director of the mother bank—*Held*, that the matter charged in each count in the indictment constitutes a punishable conspiracy at common law; and that that portion of the common law is in force in this state. *Ib.*

9. Under the constitution of the *United States*, the courts of this state have jurisdiction of the offence charged in the above indictment. *Ib.*

CONSTITUTION.

See Court of Appeals 2.

CONSTRUCTION.

1. Although penal laws are not to be extended by construction, yet they are to receive a rational interpretation. *House v House*, 125
 See Acts of Assembly.
 — Evidence 31, 36,
 — Constitution.
 — Grant 2, 16, 17, 18.
 — Guarantee 1.
 — Insurance 1.

CONTENTS.

See Evidence 12.
 — Notice 1.

CONTRACT.

1. Where there is a special contract not under seal, for labour or service, and it has been fully executed, *indebitatus assumpsit* lies for the sum stipulated by the contract. *Coursey v Corington*, 45
2. If a contract with an overseer be to give him a certain stipulated sum, and to furnish him with certain quantities of produce, the value of the produce, or damages for its non-delivery, cannot be recovered in an action of general *indebitatus assumpsit*, but the whole may be recovered in a special action on the case. *Ib.*
3. When the entire contract is to deliver certain quantities of produce, an action of general *indebitatus assumpsit* cannot be sustained to recover the value of such produce, or damages for its non-delivery. *Ib.*
4. Where the defendant agrees with the plaintiff to pay him, as overseer, a certain sum, and a certain amount of produce, and the plaintiff declares for the money only, he is not entitled to recover the value of the produce. *Ib.*

5. A plaintiff may recover less than he demands, but not more. *Ib.*
 6. No contract, of *any validity* whatever, can be made with a slave, without consent of the owner. *Hall v Mullin*, 190
 7. Executory contracts are generally void under the statute of frauds and perjuries, where the requisites of that statute are not complied with. *Enchelberger v M. Cauley*, 213
 8. A contract to deliver wheat at a future period, where the wheat at the time of the contract is unthrashed, is not within the statute of frauds and perjuries. *Ib.*
 9. The doctrine that contracts for the sale of goods, where work and labour are to be bestowed on them previous to delivery, are not within the statute of frauds and perjuries, is not to be extended to cases where the work and labour to be done may be considered parts of such contracts. *Ib.*
 10. No right can be derived under any contract made in express opposition to the laws of the place where it is made. *Hall v Mullin*, 193
- See Agreement.
- Corporations 1, 2.
 - Covenant 1.
 - Evidence 31.
 - Grant 14
 - Guarantee 1.
 - Principal and Surety 1, 2, 3.

CONVEYANCE.

1. Attesting witnesses are not necessary to a deed, and where their names are erased, it is incumbent on the party, wishing to avoid the deed, to prove that the erasure was made after its execution and delivery. *Wickes's Lessee v Caulk*, 36
2. The erasure of the names of attesting witnesses to a deed, by a stranger, after its execution and delivery, will not avoid it. *Ib.*
3. Where a deed was recorded within time, and the year when it was acknowledged was omitted in the acknowledgment, the legal inference is, that it was legally acknowledged. *Ib.*
4. J L I being seized of part of a tract of land, executed a bond of conveyance for it to J H in 1730, and at the same time put J H in possession. J H assigned the bond to B T, in 1745, and in 1749 put B T in possession. In 1750 J L I executed a deed of the land to B T. This deed was not recorded until

1794, and then under a decree of the court of chancery In 1760 J L I executed another deed for the same land to E N. J H. and those claiming under him, held possession from 1730 until 1800—*Held*, that the deed from J L I to B T, could not operate as a *feoffment*, for want of livery of seizin, nor as a *release* to enlarge the estate of the grantee, because the grantee had no legal estate, nor as a deed of *bargain and sale*, enrolled under the decree of the court of chancery, because it does not appear that E N had any notice of the deed from J L I to B T, when that to him was executed. *Carroll et al. Lessee v Norwood's heirs*, 158

5. Whether or not two deeds executed in 1750, under which the plaintiff claimed, could operate *otherwise* than deeds of *bargain and sale*, he, to prove *livery of seizin* with those deeds, having offered evidence, that from the time of their execution, the grantees therein named, and those claiming under them, down to the lessors of the plaintiff, were in possession of the land, claiming it under the title derived from the grantors, until they were ejected by the defendant? *Ib.* 164
6. Whether or not the recital in a deed from W to D, was evidence of the *existence* of a deed, stated to have been executed to them by their father for the same land, so as to *exclude* the presumption of his having died intestate as to that land; although the same *recital* was not evidence of the land *having been conveyed* to them by the recited deed. *Ib.*
7. In a sheriff's deed, as trustee of an insolvent debtor, under the act of 1774, *ch.* 28, it is not necessary to state the exact notice given by him of the time of the sale of the property mentioned in the deed. *Wininger v Diffenderffer's Lessee*, 181
8. A deed from a sheriff to a vendee, at a sale under a *fieri facias*, is not necessary to pass the legal estate, but the same becomes vested in the vendee by operation of law. *Boring's Lessee v Lemmon*, 223
9. If the grantor in a deed is in possession of part of the tract of land conveyed, that possession will extend to the whole tract, unless there had been an adversary, uninterrupted, and exclusive possession by enclosures, of a part of the land, by some other person, for 20 years

- prior to the execution of such deed
Hammond v Ridgely's Lessee, 265
10. A conveyance without any valuable consideration, and purely voluntary, in secret trust for the use of the grantor's wife and children, is fraudulent in law, and void as to creditors, who were such before and at the execution of said conveyance.
Jones v Slubey, 372
11. It is not necessary that a creditor, in order to set aside such a conveyance, should show the grantor to have been insolvent at the time of its execution, it is sufficient that he is considerably indebted to the creditor, and that no other property appears sufficient to satisfy such debt, other than that mentioned in the conveyance. *Ib.*
12. Lands being vested in the wife of N in fee tail, and she and her husband making an absolute conveyance of the same in fee to D, and his reconveying to N, the husband, in fee, also by an absolute deed, and N, more than 12 months afterwards conveying the same lands to M, by an absolute deed in fee, are not, of themselves, facts sufficient to raise a trust by implication of law for the benefit of said wife and her children; nor are the answers to a bill in equity, (filed to set aside the last conveyance, and to render the lands subject to the debts due by N prior to such conveyance,) stating such conveyance to have been made in trust for the benefit of said wife and children, sufficient to sustain the same, and to defeat the object of the bill. *Ib.*
- See* Court of Chancery 1, 4, 12.
— Evidence 16, 17, 18, 33.
— Location of Lands 1, 2, 3.
— Presumption 1.

CO-OBLIGOR.

See Admission 1.

CORPORATIONS.

1. Less strictness is observed in contracts with or by corporations than in actions by or against them *The Mager's Town Turnpike Road Company v Creeger*, 122
2. In contracts with a corporation, it is sufficient that its name be so given as to distinguish it from other corporations. *Ib.*
3. Where notice is directed to be given of the time and place for receiving subscriptions for stock in an incorporated company, the object is to prevent a monopoly of the stock,

and the want of the notice is no defence to one who does subscribe. *Ib.*

4. Where a corporation has gone into operation, and rights have been acquired under it, every presumption should be made in favour of its legal existence. *Ib.*

See Bank

— Formula 1.

COURSE AND DISTANCE.

See Calls.

— Grant 3, 4, 5, 6, 19.

COURT.

See Evidence 4, 31, 36.

— Fieri Facias 2.

— Grant 2, 16.

— Insurance 1, 2, 3.

— Jurisdiction.

COURT OF ADMIRALTY.

See Insurance 1, 2, 3.

COURT OF APPEALS.

1. Whatever question was binding on the late court of appeals, is equally binding on the present court of appeals. *Hammond vs. Ridgely's Lessee*, 267
2. Whether the 56th article of the constitution, which provides "that there shall be a court of appeals composed of persons of integrity," &c. "whose judgment shall be final and conclusive in all cases of appeal," &c. means simply that the court of appeals should be a tribunal of ultimate resort? *Quere.* *Ib.*
3. Whether the expressions in the act of 1790, *ch.* 42, "that the opinion of the court of appeals shall be conclusive in law as to the question by them decided," mean only, that the opinion of the court of appeals shall be conclusive upon the inferior court on the new trial of the particular suit sent back to them by a *procedendo*, and have no reference to any subsequent suit? *Quere.* *Ib.*
4. If the judges of the court of appeals are divided in opinion, the judgment of the court below must be affirmed. *Ib.*
- See* *Procedendo* 1.

COURT OF CHANCERY.

1. Where a bill is filed to vacate a fraudulent deed, and the fraud consists in the grantor's making the conveyance to protect his property from a debt due by him on a promissory note given by him, and endorsed to the complainant, and the debt is

- subsequently paid to the complainant by the endorser, the suit cannot be carried on for the use of such endorser, but the bill will be dismissed without prejudice. *Heighe, et al. v The Farmers Bank*, 68
2. — The endorser may, perhaps, by a bill in his own name, afterwards set aside the deed, and recover the amount paid by him to the first complainant, *Ib.*
 3. If the parties, interested in having a purchase by a trustee at his own sale vacated, know the fact of the purchase, and being under no disability to question it, stand by and permit the trustee to use and improve the property as his own, a court of equity will not afterwards grant them relief. *Davis v Simpson, et al.* 147
 4. If a trustee employs an agent to bid for him at his own sale, and he does bid, and the property is struck off and conveyed to him, and then reconveyed by the agent in pursuance of the previous agreement, in a bill in equity, to set aside both these deeds, it is unnecessary to make the agent a party, *Ib.*
 5. A surety, on paying a judgment of his principal, may in equity compel the creditor to assign the judgment, with all the liens given by the principal to secure it. *Creager v Brangle*, 234
 6. Although a court of equity will compel an assignment of a judgment against a principal debtor, which has been satisfied by the surety, it will not authorise the surety to proceed against the special bail of the principal, unless such bail is *absolutely fixed* at the time of the assignment, *Ib.*
 7. A conveyance without any valuable consideration, and purely voluntary, in secret trust for the use of the grantor's wife and children, is fraudulent in law, and void as to creditors, who were such before and at the execution of said conveyance. *Jones v Shutey*, 372
 8. It is not necessary that a creditor, in order to set aside such a conveyance, should show the grantor to have been insolvent at the time of its execution—it is sufficient that he is considerably indebted to the creditor, and it not appearing that he had any other property than that mentioned in the conveyance. *Ib.*
 9. Lands being vested in the wife of N in fee tail, and she and her husband making an absolute conveyance of the same in fee to D, and his reconveying to N, the husband, in fee, also by an absolute deed, and N, more than 12 months afterwards, conveying the same lands to M by an absolute deed in fee, are not, of themselves, facts sufficient to raise a trust by implication of law for the benefit of said wife and her children; nor are the answers to a will in equity, (filed to set aside the last conveyance, and to render the lands subject to the debts due by N prior to such conveyance,) stating such conveyance to have been made in trust for the benefit of said wife and children, sufficient to sustain the same, and to defeat the object of the bill. *Ib.*
 10. — Nor is it necessary in such a bill, the wife being dead, and leaving children, to make the children parties. *Ib.*
 11. An answer responsive to a bill, is evidence, but only entitled to the same weight that parol evidence is entitled to. *Ib.*
 12. Parol evidence of declarations or intentions, is inadmissible to raise a trust inconsistent or at variance with the *expressed* intention of a deed, where the facts and circumstances would not of themselves, by implication or construction of law, be sufficient to do so—Nor can such a trust be created for the benefit of a third person, and to defeat a complainant's equity, by an answer alleging declarations or intentions at variance with the expressed intention of a deed *Ib.*
 13. If a defendant in equity, in answer to a bill for the specific performance of a parol agreement, admits the agreement, and does not rely on the statute of frauds, the agreement will be enforced against him; otherwise, if he relies on the statute. *Ib.*
 14. Where a judgment creditor files a bill for the sale of property to satisfy his debt, a decree, that the property be sold, and the proceeds brought into court, to be applied by the court to the payment of such part of the debt as may appear to be due, is correct, provided any part of such debt be due. *Ib.*
 15. A writ of *ne exeat* cannot be granted for a debt founded on a promissory note not due. It can only issue where the demand is an equitable one. *Cox's Ex'rs. v Scott*, 384
 16. The form of a bond to be executed by the defendant on a writ of *ne exeat* being served on him, set out *Ib.*
 17. A B by his will directed that his

three grandsons should be educated until 21 years of age, out of the profits of his real estate, under the directions of his executors, and charged his real estate with the expense of their education. This direction not being complied with, they filed their bill 16 years afterwards, against the devisees in the will, to recover, as compensation for the injury they had sustained, as much money as ought, under the provisions of the will, to have been applied to their education—Bill dismissed. *Johns v Stoops et al.* 430

18. On a petition by the seven representatives of a deceased intestate, for a partition of his lands, under the act of 1786, *ch* 45, to direct descents, the chancellor decreed, that partition should be made—but this decree embracing only the lands of which the intestate died seized, he having conveyed lands by way of advancement to *H. R. W.* one of the representatives, a new bill was filed by the children not advanced, against *H. R. W.* calling upon him to bring such advancement into hotchpot. By his answer he did not elect to bring in the part conveyed to him, nor did he refuse to do so, but insisted that he had a right to elect after the commissioners should make their valuation. The chancellor considered the answer as an election not to bring in the part conveyed, and decreed the partition to be made, of the lands of which the intestate died seized, among the other representatives, excluding *H. R. W.* From this decree he appealed, but dismissed his appeal on the suggestion of the court of appeals that an amendment ought to be made so as to bring the question before the court. He afterwards, by his petition to the chancellor, stated that his answer was misconceived, and prayed leave to amend it, and to elect to bring into hotchpot his advancement at the value of the advancement at the time he received it; which was refused by the chancellor. A commission for partition having been issued and executed, the chancellor ratified and confirmed the return. From that decree *H. R. W.* again appealed—*Held*, that *H. R. W.* ought to have been permitted to amend his answer; and that he was entitled to make his election in the manner set forth in his petition. That the partition made, remain unaltered, and leave be given to *H. R. W.* to

amend his answer as prayed; and when so amended, that proof be taken of the value of the land given in advancement at the time when it was so given; and if it was of less value than the equal proportion of *H. R. W.* in the whole real estate, then the parties, among whom the partition was made, shall pay severally to *H. R. W.* such sum of money as will be sufficient to make his share of the estate equal in value of one full seventh part of the estate at the time of the valuation already made. *Warfield v Warfield, et al.* 459

See Charitable Uses.

—Trust & Trustees 1, 2, 3.

COVENANT.

1. Articles of agreement between K and S, in which K agrees to convey certain lands to S, in consideration that S would pay to K, or order, £600, and provide for the support of K and wife, during their life.—K to live on the lands and keep there two slaves, and that the future issue of such slaves should belong to S and his heirs, is a covenant and not a grant, and does not give S property in such issue. *Culver Ex'r. of Kemp v Shriner.* 213
2. In an action of covenant where D warrants and defends certain slaves sold to F, against all persons whatsoever, to be the property of F, the breach assigned in the declaration was, that the slaves, at the time of the sale, were not the property of D, but of S, who dispossessed F of them by a writ of replevin issued against D, and that D did not warrant and defend the slaves to F. There was no proof offered of the title of S, except the service of the writ of replevin, and its return to court. *Held*, that F was bound not only to state specially, dispossession of the slaves, but if it was by a stranger, he must also state a better or paramount legal title in such stranger, and support it by proof; and that the mere service of the writ of replevin, without any thing further having been done therein, was no evidence of the right or title of S to the slaves replevied. If S had made good his claim to the slaves replevied, the judgment would have afforded the best, but not the only evidence to which F could resort, to prove that S had a better title to them than D. Any other evidence, written or oral, evincing the fact,

might have been used. *Fenwick v Forrest*, 414

CRIMINAL PROSECUTION.

1. A defendant against whom a judgment has been rendered for a misdemeanor, is *ex debito justitiæ* entitled to prosecute a writ of error. *Anderson v The State*, 174
2. — Does such writ during its pendency, work a suspension of execution on the judgment? *Ib.*
3. Can a bill of exceptions be taken in a criminal prosecution for a misdemeanor? *Ib.*
4. For error apparent on the face of the record in such criminal cases as are enumerated in the act of 1785, ch. 87, s. 6, there may be an appeal. *Queen v The State*, 232
5. A bill of exceptions is not allowed in criminal cases. *Ib.*
6. A writ of error lies at the instance of the state in a criminal prosecution. *The State v Buchanan, et al.* 329
7. A transcript of the record, certified under the hand of the clerk and seal of the court, with the writ of error annexed, is a legal and sufficient return to such writ of error. *Ib.*
8. On the reversal of a judgment rendered in favour of the traversers in a criminal prosecution, a *procedendo* was awarded directing a new trial. *Ib.* 368
9. The allowance of a writ of error by the attorney general in a criminal case, is not necessary. *Ib.* 362
10. Where three persons were indicted for a conspiracy, one of them appeared, and moved to be tried separately from the other traversers, who were not then before the court—*Held* by the county court, that he might be put on his trial alone, &c. *The State v Buchanan, et al.* 500

See Arson.

— Conspiracy.

— Empty.

— Indictment 1.

CUMULATIVE REMEDY.

See Way 3.

D.

DAMAGES.

1. A plaintiff may recover less than he demands, but not more. *Coursey v Covington*, 45
- See Breaches 1, 2.
— Contract 2, 3, 4.

See Judgment 1, 2, 3.

DATE.

See Acknowledgments of Deeds 1.

DECISION.

See Binding Decision.

DECLARATION.

1. A special demurrer to a count in a declaration of general *indebitatus assumpsit* for a certain sum, without setting out the cause or consideration on which the debt accrued, ruled good. *Chandler v The State*, 284
- See Covenant 2.

DECLARATIONS.

See Evidence 10, 11, 13, 20, 33.

DEED.

See Conveyance.

— Erasure

— Manumission.

— Witness

DEFAULT.

See Judgment 1, 2, 3, 4.

DELAWARE.

1. Under the act of assembly of *Delaware*, 1797, ch. 124, a deed of manumission, to be valid, must be attested by the subscribing witness in the presence of the grantor, though it is not necessary that that fact should appear by the certificate of the attestation itself; it may be proved by evidence *aliunde*. *Negro Clara v Meagher*, 111

DEMURRER.

See Pleading 3, 4.

— Special Demurrer.

DEPOSITIONS.

1. The depositions of witnesses, taken on a survey made under a warrant of resurvey issued by the court, if the witnesses are dead, are competent evidence, and the surveyor is a competent witness to prove where such witnesses were sworn on the survey. *Bowie v O'Neale et al. Lessee*, 226

DEPUTY SHERIFF.

1. An action may be supported against a deputy sheriff for malfeasance, not in his capacity of deputy sheriff, but as a wrong doer. *Mark v Lawrence*, 64
2. If a deputy sheriff in selling goods under a *fiat facias*, commits a fraud, and the plaintiff in the judgment,

- on which the *fi. fa.* issued, is satisfied his debt, an action of trover may be sustained by the defendant in such judgment for the goods, against the deputy sheriff as a wrong doer. *Ib.*
3. A deputy sheriff, by purchasing at his own sale commits a fraud. *Ib.*

DESCENDANTS.

See Descent 1.

DESCENT.

1. Under the act of 1786, *ch* 45, where a person dies intestate and without issue, seized of an estate in land by purchase, and not derived from or through either of his ancestors, such estate descends to his brothers and sisters of the whole blood, and their descendants, in equal degree; and if one of the said brothers or sisters die, leaving a grand child, or any the most remote descendants, as his or her heir at law, such child or descendant, is entitled to the same interest in the estate, as the ancestor would have been if living, and takes the same *per stirpes* and not *per capita*. *Maxwell, et al. v Seney's Lessee*, 23
2. A died intestate, seized of a tract of land on which there was a grist mill then in operation. On a division of the land under the act to direct descents, amongst the heirs, the mill was on the part allotted to B, the dam of which covered a portion of the part allotted to C—*Held*, that B had a right to the use of the mill and dam in the same way, and to the same extent, as they had been used by A in his life-time. *Kilgour v Ashcom*, 62

See Court of Chancery 18.

— Hotchpot.

DESCRIPTION.

See Devise 12.

DETENTION.

See Insurance 10.

DEVISE.

1. A devise to F, and her heirs lawfully begotten, and in case she dies without heirs, remainder over, gives F only an estate tail. *Pratt's Lessee v Flamer, et al* 10.
2. A devise to F for life, remainder over to her issue, and in case the issue dies without heirs, remainder over to B, the issue takes only an estate for life—the words *without heirs* preceding the last remainder, meaning heirs of the body only, and not be-

ing sufficient to enlarge the interest of the first remainder-man into a fee simple. *Ib.*

3. A devise to an unborn illegitimate child, where the mother is described, is valid. *Ib.*
4. Devises to two illegitimate children, and in case either shall die without heirs, then her part to go to the survivor—the word *heirs* means *issue*, and not heirs generally. *Ib.*
5. A child *en ventre sa mere*, is capable of taking by devise; and by operation of law the interest in the land will vest in the child when born, and in the mean time descend to the heir at law. *Ib.* 12
6. A devise to the testator's children, where he has children of his own, and step-children, does not embrace the step-children, and parol evidence is inadmissible to prove that the testator intended to include them. *Fouke et al. v Kemp's Lessee*, 135
7. Has the introductory clause in a will, and the charging the estate devised with the payment of debts, the effect to enlarge the estate of the devisee? *Quere.* *Ib.*
8. A devise of land charged with the payment of a sum of money in gross, no matter how small, gives the devisee on his paying such sum, an estate in fee. *Gibson, et ux et al. Lessee, v Horton*, 177
9. A devise, on condition that the devisee will convey other lands which he has any interest in to third persons, gives to the devisee, on his making such conveyance, an estate in fee in the land devised. *Ib.*
10. There is no instance in which a devise, charged with the payment of a sum of money in gross, has been held to give the devisee any other than an estate in fee simple. *Ib.*
11. A devise of property, real or personal, to a slave, by his owner, entitles the slave to freedom, by implication *Hall v Mullin*, 190
12. A devise of a tract of land by name, and described as lying in B county, passed the whole tract, although part of it lay in A county. *Hammond v Ridgely's Lessee*, 265
13. J C, by his will, directed the income of his estate to be paid over by his executors to certain trustees, and after making several appropriations of a part thereof, further directed the residue to be equally divided, one half to be applied towards feeding, &c. the poor children belonging to the congregation of St. Peter's Pro-

- testant Episcopal Church, &c.—
Held, that such bequest is too vague and indefinite to be carried into effect, and is therefore void, and that the subject of the trust results for the benefit of the next of kin of the testator. *Dashiell, et al. v The Attorney General.* 392
14. A devise to trustees for the benefit of an indefinite object is equally as invalid as an immediate devise to such an object. *Ib.*
15. Wherever the word *poor* or *poorest* has been used as a term of description in a devise or bequest, it has been held to be insufficient for uncertainty. *Ib.* 399
16. Real property, to which the testator did not know he had a right, will pass under a clause devising “all the rest and residue of his estate.” *Hall v Mullin,* 194
See Freedom 2, 3.

DIRECTION.

See Evidence 4.

DISCHARGE.

See Insolvent Debtor 3.

DISCONTINUANCE.

See Pleading 3.

DISCOUNT.

See Set Off.

E.

EDUCATION.

See Court of Chancery 17.

EJECTMENT.

1. An ejectment may be maintained for land by its reputed name. *Fouke et al. v Kemp's Lessee,* 137
2. In ejectment on separate demises for undivided parts of the land, before the trial, all the lessors, except one, had parted with their legal interest in the land, and the nature of his interest had been converted from an undivided portion in the whole, to a several and entire interest in part—*Held*, that although the plaintiff can recover less than he claims, yet it must consist of the same nature with that claimed. If he claims 100 acres, less than 100 may be recovered; if he claims an undivided moiety, an undivided third may be recovered, or any undivided portion less than a moiety; but he cannot recover an undivided part when he claims an

entirety, nor an entirety when he demands an undivided portion. *Carroll et al. Lessee v Norwood's heirs,* 164

3. If an ejectment is brought for land by the name of A, which is covered by another tract called B, to which the plaintiff makes title, can he recover? *Ib.*
4. To recover in ejectment, the lessors of the plaintiff must have a legal title in the land at the commencement and trial of the cause. *Ib.*
5. A defendant in ejectment, being in possession of the land for which the suit is brought, holding the same by a claim of title adverse to that of the plaintiff for 20 years, is not necessarily entitled to a verdict. *Bowie v O'Neale et al. Lessee,* 226
6. If an action of ejectment is entered for the use of any person, such person is substantially a party to the action. *Hammond v Ridgely's Lessee,* 267
7. Whether the verdict and judgment in one action of ejectment is a bar to a recovery in another? *Quere.* *Ib.*
8. An action of ejectment, although in form a fiction, is in substance a remedy pointed out to him who has a right to land, of which he is wrongfully deprived—it is the title of the lessor, and not the nominal lessee, that is to be decided. *Carroll et al. Lessee v Norwood's heirs,* 173
9. A motion to enlarge the term of the demise in an action of ejectment, wherein judgment had been rendered in the late general court in 1790, refused. *Frazier et al. Lessee v Hall,* 437
10. Where a judgment in ejectment rendered in the late general court in 1802, had been enjoined by injunction, and the case brought to and affirmed in the court of appeals, on appeal from chancery, the term of the demise laid in the declaration was enlarged. *Ib. (note.)*
- See Depositions 1.*
 — Evidence 16, 17, 18.
 — Grant.
 — Limitation of Actions 2.
 — Location of Lands.
 — Possession.

ELECTION.

See Hotchpot.

EMPTY.

1. The word *empty*, mentioned in the fifth section of the act of 1809, ch. 138, is used only to distinguish a barn, having the articles therein

enumerated, from one that has not, and was not intended to mean a barn entirely empty. Every barn not containing the said enumerated articles is, in the meaning of the said section, an empty barn. *House v House*, 125

ENCLOSURE.

See Limitation of Actions 2.
— Possession 3.

ENROLLMENT.

See Conveyance 3.

EQUITABLE ASSIGNMENT.

See Principal and Surety 11.

EQUITABLE INTEREST.

See Attachment 5.
— Fieri Facias 6.

EQUITY.

See Court of Chancery.

ERASURE.

1. Attesting witnesses are not necessary to a deed, and where their names are erased, it is incumbent on the party wishing to avoid the deed, to prove that the erasure was made after its execution and delivery. *Wicker's Lessee v Caulk*, 38
2. The erasure of the names of attesting witnesses to a deed, by a stranger, after its execution and delivery, will not avoid it. *Ib.*

ERROR.

1. The refusal of an inferior court to grant a new trial cannot be assigned for error. *Anderson v The State*, 174
- See Writ of Error.

ESCHEAT GRANT.

See Grant 27.

ESTATE FOR LIFE.

1. A devise to F for life, remainder over to her issue, and in case the issue dies without heirs, remainder over to B, the issue takes only an estate for life—the words *without heirs* preceding the last remainder, meaning *heirs of the body only*, and not being sufficient to enlarge the interest of the first remainder-man into a fee simple. *Pratt's Lessee v Flamer, et al.* 10

ESTATE TAIL.

1. A devise to F, and her heirs lawfully begotten, and in case she dies with-

out heirs, remainder over, gives F only an estate tail. *Pratt's Lessee v Flamer, et al.* 10

EVIDENCE.

1. The admissions of the executor or administrator of a co obligor, are not evidence against the surviving obligor in an action against him by the obligee. *Wilmer v Harris*, 1
2. Parol evidence, that promissory notes were drawn to relieve other notes of the same amount, where the last mentioned notes are not produced, and no legal account given of them, is not admissible. *Ib.* 3
3. In an action by a father for the seduction of his daughter above the age of 21, very trifling acts of service are sufficient evidence of her being in fact his servant. *Mercer v Wolmsley*, 27
4. Where the evidence is all on one side, the court have a right to say that it is not sufficient to entitle the party to a verdict. *Ib.*
5. The return to a commission to take testimony out of the state, was held to be well executed, although there was no other evidence that the person, who administered the oath to the commissioner, was a justice of the peace, than his own act, and the return of the commissioner. *Wickup v Pratt*, 31
6. Hearsay evidence is not admissible to prove the sale of a slave, but is admissible to establish a pedigree, and to identify the original ancestor, from whom the pedigree is deduced. *Ib.*
7. General reputation of a petitioner, or his maternal ancestor, being entitled to freedom, is not admissible in evidence. *Ib.*
8. Improper evidence having been used on one side, does not justify the same kind of evidence, if objected to, being used on the other side. *Ib.*
9. A will and inventory, stating a negro to be a slave, are evidence that the testator claimed title to such slave, and that she was appraised as a part of his estate. *Ib.*
10. The declarations of one of the representatives of a deceased person, are not evidence against another, in a suit by that other. *Ib.*
11. The declarations of the ancestor, under whom a petitioner for freedom derives his title, are evidence against such petitioner, and are not within the act of 1717, ch. 13. *Ib.*

12. Proof cannot be given of the contents of a paper in the possession of the opposite party, unless notice has been given to him to produce it. *Kennedy v Fowke*, 63
13. The declarations of the owner of slaves, driven from *St. Domingo*, by the insurrections in that island, of his intention to return when the troubles there had ceased, are evidence of such intention, and if he does not become a naturalized citizen, are conclusive evidence, and this, although he continues actually to remain here for any number of years. *Baptiste et al. v De Volun-brun*, 86
14. The laws of foreign states are facts, and must be proved as other facts.—Historical evidence of them is insufficient. *Ib.*
15. Under the act of assembly of Delaware, 1797, ch. 124, a deed of manumission, to be valid, must be attested by the subscribing witness in the presence of the grantor, though it is not necessary that that fact should appear by the certificate of the attestation itself; it may be proved by evidence aliunde. *Negro Clara v Meagher*, 111
16. Where the whole of a tract of land is located on the plots in the cause, a deed, conveying the whole, may be given in evidence, though it is not itself located. *Beall's Lessee v Bayard*, 127
17. If a deed contains less than the entire tract, it cannot be given in evidence without being located on the plots in the cause, notwithstanding the location of the entire tract. *Ib.*
18. Where a deed reciting that A F was seized in fee of a tract of land called B, lying in, &c. which was granted by the proprietary to T F, and by T F conveyed to J C, and by J C to A F, and that A F had bargained and contracted with T B for the sale of the said tract as shall not have been affected by elder surveys—and then professing, for the sum of \$5000, which had been decreed to A F by the chancellor, to convey to T B “the said tract as corrected by a survey made by decree of the chancellor, the metes, bounds, courses and distances, being then established, to have and to hold the said tract thereby granted, to the said T B, and his heirs,” &c. It was held, that such deed conveyed only the quantity of land included within the metes and bounds, &c. established by the chancellor, and could not be given in evidence unless located on the plots in the cause. *Ib.*
19. Parol evidence is not admissible to prove that a testator in a devise to his children, where he had children of his own and step-children, intended to include his step-children. *Fouke et al v Kemp's Lessee*, 125
20. Notes or memoranda of a surveyor who is dead, endorsed on his certificate of survey, are, on proof of his hand writing, competent evidence to show the original running of the land, to which they relate, but not to elongate or shorten, or in any manner to affect, the position of the land as described in the grant. *Snaveley v M-Pherson and Brien*, 150
21. The certificate of justices of the peace of their proceedings under the act of 1774, ch 28, relative to insolvent debtors, is of itself, evidence of the facts it contains, and a party claiming under such proceedings is not compelled to prove such facts by evidence aliunde the certificate. *Winniger v Diffenderfer's Lessee*, 181
22. Where it appears by the proceedings of the justices under the act of 1774, ch 28, that the insolvent, at the time of applying for its benefit, had been in confinement for twenty days and upwards, and that afterwards at the meeting of the justices, the insolvent and sheriff, the sheriff certified to the justices that the insolvent had been in prison fifty two days, the legal inference is, that he had not been confined for a longer period, although no negative words are used showing that not to have been the case. *Ib.*
23. It is not necessary that it should appear negatively in the proceedings under the act of 1774, ch 28, that the debts of the insolvent, at the time of his application, do not exceed £200 sterling—it is sufficient if it appears affirmatively. *Ib.*
24. The omission of the word “or” which immediately precedes the words “to secure the same to receive or expect any profit or advantage,” &c in the oath required by the act of 1774, ch 28, does not materially change the meaning of such oath. *Ib.*
25. In a sheriff's deed, as trustee of an insolvent debtor under the act of 1774, ch 28, it is not necessary to state the exact notice given by him of the time of the sale of the property mentioned in the deed. *Ib.*

26. Whether or not proceedings under the insolvent laws are liable to all the objections incident to those of other special and limited authorities? *Ib*
27. The evidence given by a deceased witness in a former trial of the same cause, and on the same issue, may be proved in a subsequent trial, but not the legal effect of such evidence. *Bowie v O'Neale et al. Lessee.* 226
28. The depositions of witnesses taken on a survey made under a warrant of resurvey issued by order of court, if the witnesses are dead, are competent evidence, and the surveyor is a competent witness to prove where such witnesses were sworn on the survey. *Ib.*
29. A party cannot impeach the credit of his own witness. *Queen v The State.* 232
30. Parol evidence is introduced where there is a latent ambiguity, not apparent on the face of the grant—as where the grantor had two tracts of land called B, or if a tree is called for, and there are two trees set up as the call, &c. *Hammond v Ridgely's Lessee* 255
31. The construction of letters and written evidence, whether A made a contract to guarantee the payment of money due from F to D, is a question of law to be decided by the court. *Ferris v Walsh.* 306
32. An answer in chancery responsive to the bill, is evidence, but only entitled to the same weight that parol evidence is entitled to. *Jones v Slukey.* 372
33. Parol evidence of declarations or intentions, is inadmissible to raise a trust inconsistent or at variance with the expressed intention of a deed, where the facts and circumstances would not, of themselves, by implication or construction of law, be sufficient to do so. Nor can such a trust be created for the benefit of a third person, and to defeat a complainant's equity, by an answer alleging declarations or intentions at variance with the expressed intention of a deed. *Ib.*
34. Where notes had been paid at bank for another person, and they were not produced, nor any legal account given of them, evidence of such payment cannot be received. *Wilmer v Harris,* 3
35. What is asserted in the presence of a party to a suit, and not contradicted by him, is received as evidence against him, on the ground, that his silence is an implied admission of the truth of what was said. *Batture v Sellers & Patterson,* 119
36. The construction of written evidence is with the court and not the jury. *Garrell v Hanna,* 412
37. The testimony of a senator of the U. S that the plaintiff's nomination to office had been rejected by the senate, is admissible evidence, where the plaintiff had applied to the senate for the removal of the injunction of secrecy in relation to such rejection, and failed in his application. *Law v Scott,* 438
38. These words of the deposition of a witness, "but the charges above mentioned, from their character, could not have failed to have produced its rejection, [the nomination to office,] even if there existed no other reason for it; and they doubtless, I presume, had a very considerable effect in producing it," being the opinion only of the witness, are not competent evidence. It is competent evidence, however, for the witness to say, that such charges caused him to vote against the nomination. *Ib.*
39. Evidence of the misconduct of the plaintiff, in particular instances, going to prove his unfitness for the office to which he was nominated, is inadmissible. *Ib.*
40. A record of the proceedings, and final discharge under the insolvent laws, of a person against whose goods, &c an attachment issued on a judgment rendered against him before such discharge, and laid in the hands of his garnishees, admitted in evidence on the trial against the garnishees. *Harding v Hull & Tyson, garnishees of Boyle,* 478
41. — Such evidence to be left with the jury to say, whether or not it supported the plea of *nulla bona* pleaded by the garnishees. *Ib.*
42. A return made by a sheriff to a writ of replevin, that the goods were replevied and delivered, is *prima facie* evidence that the goods were replevied and delivered according to the return; and a letter from the sheriff to the plaintiff saying he would be security for the future delivery of the goods, cannot be considered as having the double capacity of disproving the *prima facie* evidence arising from the sheriff's return, and establishing a *prima facie* case, that the goods were not then delivered. *Hayes v Lusby,* 485

43. The hand writing of the drawer and endorsors of a promissory note being proved, the note may be read in evidence without proof of its having been protested. *Whittington v The Farmers Bank, &c.* 489
44. The protest of a promissory note is not evidence of itself in chief of the fact of a demand on the drawer. If the notary public was dead, the case would be governed by different considerations. 16.
45. It is no objection to a protest, which is stated to have been made at the request of *The Farmers Bank of, &c.* instead of *The President, &c.* the corporate name. 16.
46. Parol evidence is admissible to prove that a written order, entered among the proceedings of the board of directors of a bank, was rescinded and annulled, by a subsequent verbal order, of which no minute in writing was made. 16.
47. — The parol proof of such verbal order need not establish that the order was rescinded by the board of directors at a regular meeting of the board at the ordinary place of meeting, consisting of the president, and not less than the number of directors required by the charter for transacting the ordinary business of the bank—nor need such parol testimony show the day and year when the order had been rescinded. 16.
48. Evidence that there was not a sufficient number of directors of the bank present at the time of making a certain order, competent to transact business of that description, and that funds had been withdrawn from the bank under that order, when the charter required a greater number of directors, whereby the defendant, as a stockholder, had been deprived of a dividend on his stock, &c. *Held*, that the evidence was inadmissible. 16.
49. The court refused to direct the jury that the testimony of a witness was insufficient, and not competent in law, on account of its vagueness and uncertainty, to prove the rescinding of an order adopted by the board of directors of a bank. 16.
- See Assault and Battery 1, 2.
- Attachment 4.
 - Conveyance 5, 6.
 - Covenant 2.
 - Grant 20, 21.
 - Insurance 8.
 - Recital.
 - Son Assault Demesne.

See Will 3.

EXECUTION.

1. Where there is a judgment by default in an action on a bond with a collateral condition, there must be breaches suggested, and the damages assessed as directed by the statute of 8 and 9 Wm. III, ch. 11, before an execution can issue against the defendant, and if it be sooner issued it will, on motion, be quashed. *Wilmer v Harris.* 1
 2. An execution is never supposed to be issued by the authority of the court, except where it might properly issue. *Paul's Lessee v Duvall.* 69
- See Appeal.
- Capias ad Satisfaciendum.
 - Fieri Facias.
 - Principal and Surety 11

EXECUTOR AND ADMINISTRATOR.

1. The admissions of the executor or administrator of a co-obligor, are not evidence against the surviving obligor in an action against him by the obligee. *Wilmer v Harris.* 1
- See Administration Bond.

EXECUTORY CONTRACT.

See Contract 7, 8, 9.

EXTINGUISHMENT.

See Principal and Surety 11.

- Release.
- Way 6, 9.

F.

FACTS.

See Slaves 6.

- Sheriff 5.

FALSE RETURN OF PROCESS.

See Sheriff 6.

FATHER AND DAUGHTER.

See Seduction.

FEE SIMPLE.

See Devise 7, 8, 9, 10.

- Will 1.

FEME SOLE.

See Infants 1, 2.

FEOFFMENT.

See Conveyance 4.

FIERI FACIAS.

1. If a sheriff seizes property under a *fieri facias*, and returns it unsold

- For want of buyers, and goes out of office, the *venditioni exponas* must be issued to him, and not to his successor; and if issued to his successor, all his acts under it are void. *Purl's Lessee v Duvall*, 69
2. An execution is never supposed to be issued by the authority of the court, except where it might properly issue. *Ib.*
3. A deed from a sheriff to a vendee, at a sale under a *feri facias*, is not necessary to pass the legal estate, but the same becomes vested in the vendee by operation of law. *Boring's Lessee v Lemmon*, 223
4. The interest which a mortgagor had in lands mortgaged by him, was, before the acts of 1795, *ch.* 56, and 1810, *ch.* 160, liable to be attached, condemned and sold under a *feri facias*. *Ford, et al. v Philpot, et al.* 312.
5. Where there is not that certainly in a sheriff's return of land seized under a *feri facias*, will his deed to the purchaser at a sale thereof cure the defect? *Quere. Purl's Lessee v Duvall*, 73
6. If the defendant had only an equitable estate in land when a judgment was obtained against him, and when the land was seized under a *feri facias* issued on that judgment, could it be sold under a writ of *venditioni exponas*, although he had before then acquired a legal estate therein? *Quere Ib.*

See Fraud 1, 3.

— Deputy Sheriff 1, 2, 3.

FOREIGNERS.

See Slaves 2, 3, 4.

FOREIGN JUDGMENT.

See Judgment 6.

FORMER TRIAL.

See Evidence 27.

FOREIGN LAWS.

1. The laws of foreign states are facts, and must be proved as other facts—Historical evidence of them is insufficient. *Baptiste et al. v De Volunbrun*, 86
2. Where the laws of this state, and of any other, differ, the court here is bound to administer the former. *Davis v Jacquin and Pomerail*, 100
- See Slaves 6, 7.

FORMULA.

1. By the act of 1813, *ch.* 138, the form

prescribed for taking subscriptions for stock in a road company, was that the subscribers should sign the following agreement: "We whose names are hereunto subscribed, do promise to pay to The President, Managers and Company, of The Hager's Town Turnpike Road Company, the sum of — dollars for every share of stock in the said company set opposite to our respective names." The form used omitted the word "President;" and it was held to be sufficient and binding on the subscribers. *The Hager's Town Turnpike Road Company v Creeger*, 122

See Corporations 1, 2.

FRAUD.

1. If a deputy sheriff, in selling goods under a *feri facias*, commits a fraud, and the plaintiff in the judgment, on which the *fi. fa.* issued, is satisfied his debt, an action of trover may be sustained by the defendant in such judgment for the goods, against the deputy sheriff, as a wrong doer. *Mark v Lawrence*, 64
2. Whether there has been such fraud, is a question of fact for the decision of the jury. *Ib.*
3. A deputy sheriff, by purchasing at his own sale, commits a fraud. *Ib.*
- See Grant 15, 25.

FRAUDS.

See Statute of Frauds.

FRAUDULENT CONVEYANCE.

See Conveyance 10, 11, 12.

FREEDOM.

1. A devise of property, real or personal, to a slave; by his owner, entitles the slave to freedom, by implication. *Hall v Mullin*, 190
2. M, by her will in 1776, bequeathed to P a negro girl named A, then 15 years of age, until she should arrive to the age of 21, and that he should manumit her and her posterity immediately after the death of M, so that their freedom might be secured to them at the age of 21. M devised the residue of her estate to S, and died in 1786. S administered on her estate, and in 1819, by deed, he manumitted the petitioners, the descendants of A, born after the death of M, stating in his deed that P had neglected to do so—*Held*, that they were entitled to freedom. *Hughes v Negro Mitty, et al.* 310
3. Under the act of 1752, *ch.* 1, manu-

mission, by last will, was effectual to give freedom to slaves, if not made during the last sickness of the testator. *Id.*

See Slaves.

— Widow 1.

FUGITIVES.

See Slaves 1, 2, 3, 4.

G.

GARNISHEE.

See Attachment 4

— Attorney at Law.

— Evidence 40, 41.

GENERAL DESCRIPTION.

See Devise 12.

GENERAL REPUTATION.

See Ejectment 1.

— Evidence 7.

GRANT.

1. J I, having made a survey of land, obtained a certificate thereof, and paid the composition money, devised the land to his three sons—the possession of the land was held by himself and sons for about 74 years. Under such circumstances the legal presumption is, that a grant for the land regularly issued, although it appeared that a grant actually issued to J I, after his death, such grant being entirely void, and producing no effect whatsoever. *Carroll et al. Lessee, v Norwood's heirs*, 155
2. It is the province of the court to construe grants and deeds, as well in regard to the land intended to be transferred, as to the estate intended to be created; and in all cases, except that of a latent ambiguity, this construction must depend on the grants or deeds themselves, and not on matters *de hors*. *Id.* 159
3. Calls in a grant are first to be gratified—when there are none, resort is to be had to course and distance. *Id.*
4. The line of a tract of land may as well be the subject of a call as a natural object. *Id.*
5. Calls are preferred to course and distance, because it operates most beneficially for the grantee. *Id.*
- 6 The location of calls is to be decided by the jury. *Id.*
7. The 4th, 5th, 6th, and 7th lines of a tract of land, were stated by the grant to run as follows, viz. N 160 ps, then W 60 ps with a tract lately taken up by G Y, then W S W 200

ps with the said land, then bounding on the said Y's land.

Held, that the said 5th, 6th, and 7th lines, must run with and bind on the lines of G Y's land, and that the 4th line must be controlled by the other lines, and terminate wherever the jury should find it would strike the said Y's land, by either elongating or shortening it. *Id.*

8. The king of England has a right to grant land, covered by navigable waters, subject to the right of the public to fish and navigate them. *Brown et al Lessee v Kennedy*, 195
9. The former proprietors of Maryland acquired the same right of disposing of land covered by navigable waters within the province, subject to the like restrictions, under the charter by which the province was granted to them by the King, as the King had prior to the charter. This right is now vested in the state. *Id.*
10. Where the lines of a grant of a tract of land include a navigable river, the soil covered by the river will pass by the grant, though it be not described as land *aqua cooperta*, where the grantor has himself title to such soil. *Id.*
11. By the common law, proprietors of land, bounded by unnavigable rivers, have not only the right of fishing, but a property in the soil covered by such rivers, *ad flum medium aquæ*. This is also the law of this state. *Id.*
12. If one holds land bounding on a navigable river, and is also entitled to the land the river covers, and grants the former land, describing it as lying on the river, and bounding it on the river, the grantee will be entitled, as well to the soil the river covers, as to the land expressly granted. *Id.*
- 13 The state is entitled to unnavigable rivers, and to the soil they occupy, and if the state grants land lying on such river, and calls for the river as the boundary of the grant, the grantee becomes Riparian Proprietor, and entitled to the land the river covers, *ad flum medium aquæ*. *Id.*
14. Articles of agreement between K and S, in which K agrees to convey certain lands to S, in consideration that S would pay to K, or order, £600, and provide for the support of K and wife during their lives—K to live on the lands, and keep there two slaves, and that the future issue of such slaves should belong to S, and

- his heirs, is a covenant and not a grant, and does not give S property in such issue. *Culver Ex'r of Kemp v Shriper*, 218.
15. A grant fraudulently obtained is void, and if one afterwards issues for the same land, the legal estate becomes vested in the second grantee. *Boring's Lessee v Lemmon*, 223.
16. It is the province of the court to decide on the construction of grants, except in the single instance of a latent ambiguity. *Hammond vs. Ridgely's Lessee*, 254.
17. The construction of a grant is to be made according to the intention of the parties, to be collected from the words and expressions therein. *Ib.*
18. — In doubtful cases that exposition is to be given, which is most beneficial to the grantee. *Ib.* 255.
19. Calls in grants, if imperative, must be complied with, and the course and distance rejected, if they do not correspond with the call. If the call is not imperative, or cannot be proved, then the location of the land must be according to course and distance. *Ib.*
20. When the controversy is as to the location of the land, it must be located on the plots by the parties, and to support such locations, the evidence produced must conform to the true exposition of the grant. *Ib.*
21. Parol evidence is introduced where there is a latent ambiguity, not apparent on the face of the grant—as where the grantor had two tracts of land called B, or if a tree is called for, and there are two trees set up as the call, &c. *Ib.*
22. A tract of land described in a grant as running to bounded trees, “then N 66 dg. E 120 perches, to a bounded white oak standing by the river, then bounding on the said river, running S 5 dg. E 270 perches, then by a straight line to the first bounded tree”—*Held*, that the last course was to run a straight line, and not to bind with the river, to the beginning. *Ib.* 256, 260.
23. Where a tract of land, described in the grant as beginning at a tree standing by a river and running and bounding on the said river N 4 dg. E 87 perches, then N. &c. sundry courses, then 1 dg. W 48 perches, to a bound oak by the river—*Held*, that all the subsequent courses, after the first, were to be run according to course and distance, until the course N 1 dg. W 48 perches. *Ib.* 257, 260.
24. A grant of land described as “lying in the fork of *Patuxent* river, beginning at a bounded white oak standing near the head of a branch, running from the said branch S W by W 180 perches, to a bounded red oak standing on the E side of the W great branch of the said river, then bounding on the said great branch, running W N W 40 perches, then W S W 28 perches, then,” &c. “then N and by E 16 perches, to a bounded beech standing by the said great branch, then into the woods N E by N 220 perches, to a bounded oak,” &c. must be located to bind on *Patuxent* river, from the second boundary standing by the E side of the western great branch of the river, the several courses mentioned in the grant, to the bounded beech standing by the said branch. *Ib.* 253, (note)
25. If a certificate of survey, made by the surveyor of B county, includes land lying in A county, a grant, on a caveat, would be refused for the land in A county. But if a grant was obtained, and there was no fraud in its obtention, it will operate to pass the land. *Ib.* 261.
26. Where a tract of land was granted to A in 1694, and an adjoining tract was granted to B in 1695, and B entered upon a part of A's land, and it was possessed, used, and occupied by B, and those claiming under him, for upwards of 100 years, a conveyance will not be presumed from A to B for the land so possessed, nor that there had been an actual ouster of such part. But if B, and those claiming under him, were in the adversary, uninterrupted, and exclusive possession, by enclosures, of the land in dispute, for 20 years, in such case A will be barred by the act of limitations. *Ib.* 263.
27. Where land liable to confiscation was surveyed under an escheat warrant previous to an application to the executive to purchase it as being liable to confiscation, the grant obtained on the escheat certificate was held to vest a title in the escheator, although the composition money on the escheat was not paid, and the grant not issued, until after the application to purchase. *Stewart v Donaldson's Lessee*, 423.
- See Presumption 2.

GUARANTEE.

1. Where A had sold tobacco for B to F, on a credit, and taken his note therefor, B, desirous of realizing the money due from F, addressed a letter to A, requesting him to state upon what terms he will guarantee the proceeds of his tobacco, and to say for what sum he might draw, if those terms were accepted by him, A, in answer, states the amount due to B, and authorises him to draw for that amount, after deducting interest with 9 per cent exchange on a part thereof, making no mention of the subject of guarantee. B makes the deductions, and draws on A for the balance, which A paid. C, having failed, no part of his note, when it became due, was paid; and in an action by A, to recover from B the money paid on B's draft—*Held*, that A contracted with B to guarantee the payment of the money due from F for the tobacco sold. *Ferris v Walsh*, 306
See Evidence 31.

H.

HEARSAY.

See Evidence 6, 7, 10, 11.

HEIRS.

1. Devises to two illegitimate children, and in case either *dies without heirs*, then her part to go to the survivor—the word *heirs* means *issue*, and not heirs generally. *Pratt's Lessee v Flamer et al.* 10
2. Under the act of 1786, ch. 45, where a person dies intestate, and without issue, seized of an estate in land by purchase, and not derived from or through either of his ancestors, such estate descends to his brothers and sisters of the whole blood, and their descendants, in equal degree; and if one of the said brothers or sisters die, leaving a grand child, or any the most remote descendants, as his or her heir at law, such child or descendant is entitled to the same interest in the estate as the ancestor would have been if living, and takes the same *per stirpes* and not *per capita*. *Maxwell, et al. Lessee v Seney's Lessee*, 23

See Way.

HIGHWAY.

HOTCHPOT.

1. The children of a deceased intestate, to whom lands had been conveyed by way of advancement, may elect to

bring such advancement into *hotchpot*, at the value of the advancement at the time it was made. See *Court of Chancery 18*, and *Warfield v Warfield, et al.* 459

HUSBAND AND WIFE.

1. If the personal estate of a deceased, after the payment of his debts, is not sufficient to compensate his widow for her thirds, negroes bequeathed to be free, may be allotted to her as slaves for life. *Negro William v Kelly*, 59
2. The will of a husband does not pass his wife's land, and no possession of the same, by a devisee, under the will, can create a presumption of title. *Bowie v O-Neale, et al. Lessee*, 226

I. J.

ILLEGITIMATE CHILDREN.

1. A devise to an unborn illegitimate child, where the mother is described, is valid. *Pratt's Lessee v Flamer, et al.* 10
2. Devises to two illegitimate children, and in case either shall *die without heirs*, then her part to go to the survivor—the word *heirs* means *issue*, and not heirs generally. 16.

IMPORTATION.

See Slaves 1, 2, 3, 4.

IMPROPER QUESTION.

See Bank 9.

IMPROVEMENTS.

See Mortgage 3.

INDEBITATUS ASSUMPSIT.

See Assumpsit

INDICTMENT.

1. An indictment charging that the traverser "did assist a negro woman N, the slave of J A, in eloping and running away from the said J A, by accompanying her a considerable distance, and showing her the road by which she might escape, thereby depriving her master J A, of the services of said slave," is sufficiently laid under the act of 1796, ch 67, s 19. *Queen v The State*, 232
2. The form of an indictment for a conspiracy to defraud a bank, &c. *The State v Buchanan, et al.* 318
See Conspiracy 3, 4, 6.
— Criminal Prosecution

INDIVIDUAL.

See Bank of United States 2.

INDORSEMENT.

See Blank Indorsement 1.
— Promissory Note 1, 2.

INDORSORS.

See Agreement 1.

INFANTS

1. By the act of 1798, *ch* 101, the disabilities of infancy are not removed, except in the particular cases therein expressly provided. *Davis v Jacquin and Pomerail*, 100
2. A female under the age of 21 years cannot dispose of her personal estate, although she is entitled to the possession of it at the age of 16. *Ib.*
3. A bill of sale executed by a female under the age of 21 years, but above the age of 16, is voidable by her on her arrival at the age of 21. *Ib.* 106, (note)

See Limitation of Actions 3.

INFERENCE.

See Acknowledgments of Deeds 1.

INJUNCTION.

1. An injunction bond is only binding with reference to the *judgment it recites*, and is a security for the payment of no other judgment than the recited one. *Morgan v Blackiston*, 61
2. Whether an action can be maintained on an injunction bond where the suit in chancery abated by the death of the complainant? *Quere.* *Ib.*

INQUIRY OF DAMAGES.

See Judgment 1, 2, 3, 4.

INSOLVENT DEBTORS.

1. The certificate of justices of the peace of their proceedings under the act of 1774, *ch* 28, relative to insolvent debtors, is itself evidence of the facts it contains, and a party claiming under such proceedings is not compelled to prove such facts by evidence *aliunde* the certificate. *Winigder v Diffenderffer's Lessee*, 181
2. Whether or not proceedings under the insolvent laws are liable to all the objections incident to those of other special and limited authorities? *Ib.*
3. A discharge of an insolvent debtor under the act of March 1774, *ch* 28, will not release him of a debt contracted subsequent to the passage of that act, although both himself

and his creditor were citizens of this state at the date of such discharge. *Gordon v Tumer*, 369

4. There is no adequate provision in the general insolvent laws of this state, for dispossessing an insolvent debtor of his property, from the time of his application for relief. *Kennedy v Boggs*, 403
5. A provisional trustee, appointed under the act of 1816, *ch* 221, s. 2, is to take possession of the insolvent's property; but no power is given him to recover such property from third persons; where that is to be done, (there being no permanent trustee,) the name of the insolvent must be used. *Ib.*
6. The possession only, passes to the provisional trustee, and the absolute property remains with the insolvent until a permanent trustee is appointed, in whom, by operation of the insolvent acts, the title to the property vests. *Ib.*
7. The provisional trustee has only power to possess and preserve the insolvent's property for the benefit of his creditors; and for the protection of that right he may sue if his possession is invaded. *Ib.*
8. To avoid a deed or assignment by an insolvent debtor, it must be made with a view and under the expectation of becoming an insolvent debtor, and with an intent thereby to give an undue and improper preference. *Per Chase, Ch. J.* *Ib.*
9. The time when a person becomes an insolvent debtor, under the insolvent laws, is when he files his petition for the benefit of those laws. *Ib.*
10. An assignment made by an insolvent through coercion of the law, is not an undue and improper preference. *Ib.*
11. Before a final release can be obtained by an insolvent, the trustee must certify to the court that he has received all the property contained in the insolvent's schedule. *Ib.* *Ib.*
12. Where there is no final discharge, the petition of the insolvent, and all the proceedings under it, are ineffectual and void, and the property will be divested out of the trustee, and revert to the petitioner, and vest in him by operation of law, as a resulting trust, (the original object of the trust having failed,) and will be liable to be operated on and affected under the general laws as the property of the petitioner. *Ib.* *Ib.*

See Bankrupt 1, 2.

— Evidence 22, 23, 24, 25.

INSURANCE.

1. The words of a warranty in a policy of insurance "*not to abandon in case of capture until condemned*," are to be construed according to their ordinary sense, and must be understood to mean a capture *jure belli*, and a judicial condemnation on such capture by a prize court of competent jurisdiction. *Barney v The Maryland Insurance Company*, 139
2. If a policy contains the warranty above mentioned, and the vessel insured be captured, and taken and retained in the service of the government to which the captor belongs, without being condemned by a prize court of competent jurisdiction, the insured has no right to abandon. *Ib.*
3. The seizure and appropriation of an insured vessel by a foreign government, without the sentence of a court of competent jurisdiction, does not divest the owner, (though insured,) of his right of property; and, so long as the vessel exists, he cannot recover as for a total loss, without abandoning. *Ib.*
4. Whenever there is *spes recuperandi*, the insured must abandon to entitle himself to demand of the insurers as for a total loss. *Ib.*
5. The words in a policy "insured against all risks *except seizure as port*," must be understood to mean any arbitrary seizure. *Ib.*
6. Though the plaintiff declares as for a total loss, he may, if the evidence will justify it, recover as for a partial loss. *Ib.*
7. In an insurance on a vessel, no loss incurred by reason of wages, provisions or demurrage, during her detention in port, can be recovered. *Ib.*
8. When there is a loss by capture, the insured cannot recover as for a partial loss on a policy insuring against capture, without giving other evidence than the *spes recuperandi*—A different rule would lead to fraud and injustice on the underwriters. *Ib.*
9. When G and H are joint and equal owners of a vessel, and H has her insured in his own name to amount of \$1500, rating her value at \$2500, the policy does not cover the interest of G. Nor can he recover any part of the insurance from H on his receiving it from the insurers. *Garrell v Hanna*, 412
10. Under a policy of insurance, in the

usual form, made during the late war between Great Britain and the United States, the vessel insured proceeded on her voyage and was stopped by the enemy's squadron supporting the blockade of the Chesapeake bay, and sent back to port—*Held*, that it was not an arrest and detention by Princes, &c. nor a capture by enemies, within the policy. *Patterson v The Marine Insurance Company*. 417

INTENTION.

See Evidence 13, 33.

INTERLOCUTORY JUDGMENT.

See Judgment 3.

INTERROGATORIES.

See Commission & Commissioners 4.

INTESTATE'S ESTATE.

See Descent

JOINT ASSAULT & BATTERY.

See Assault and Battery 2.

JOINT OWNERS.

See Insurance 9.

ISSUE.

1. Devises to two illegitimate children, and in case either *dies without heirs*, then her part to go to the survivor—the word *heirs* means *issue*, and not heirs generally. *Pratt's Lessee v Flamer, et al.* 10

JUDGE.

See Judicial Duties.

— Office and Officer 3.

JUDGMENT.

1. Where there is a judgment by default in an action on a bond with a collateral condition, there must be breaches suggested, and the damages assessed as directed by the statute of 8 & 9 Wm. III, ch. 11, before an execution can issue against the defendant; and if it be sooner issued it will, on motion, be quashed. *Wilmer v Harris*, 1
2. If the breaches are stated in the declaration, and there is a judgment for the plaintiff on confession, by *nil dicit*, or on demurrer, they need not be again suggested to enable the jury to assess the damages; nor is such suggestion necessary where the judgment is for the plaintiff on the defendant's demurrer to a replication setting forth the breaches. *Ib.*
3. Before the damages in such an ac-

- tion are assessed in the manner before stated, the judgment is only interlocutory, *Ib.*
4. The act of assembly of 1794, *ch* 46, does not interfere with the statute of 8 & 9 *Wm* 111, *ch* 11. *Ib.*
5. A plaintiff may recover less than he demands, but not more. *Coursey v Covington*, 45
6. If a slave belonging to a citizen of this state should be declared free by the judgment of a court of competent jurisdiction in another state, when he would not be entitled to freedom under the laws of this state—Whether or not such judgment would be binding here?—*Quere. Davis v Jacquin & Pomerail*, 100
7. Does a writ of error on a judgment in a criminal prosecution for a misdemeanor, during its pendency, work a suspension of execution on the judgment? *Anderson v The State*, 174
8. Whether a verdict and judgment in one action of ejectment is a bar to a recovery in another?—*Quere. Hammond v Ridgely's, Lessee*, 267
- See Binding Decision
- Principal & Surety 3, 4, 5, 6, 7, 9, 10.
- Trover 1, 2.

JUDICIAL DUTIES.

1. The duties imposed on the chief judge of the third judicial district by the acts of 1805, *ch* 65, s. 19, 1806, *ch* 55, s. 2, and 1811, *ch* 189, are judicial duties. *The State v Chase*, 297
2. The legislature may rightfully and constitutionally, impose upon the judges any new and additional judicial duties, which the varying circumstances of the state may require; or which, suggested by experience, may in their judgment be deemed necessary to the due administration of justice. *Ib.*

JURISDICTION.

1. The decisions of a tribunal, having no jurisdiction, are not voidable only, but void. *Wicke's Lessee v Caulk*, 36
2. A tribunal of special jurisdiction must show its jurisdiction on the face of its proceedings *Ib.*
3. Under the act of 1718, *ch* 18, the whole, or a majority of the commissioners only, are competent to act, unless where a selection of a less number, not less than three, is made by those interested in the

- lands, the bounds whereof are to be settled. If such a selection be made by other persons than those interested, and the commissioners proceed to act under it, their acts are void, and not aided by any length of acquiescence in their decision. *Ib.*
- 4 Where a court has general jurisdiction; but its proceedings in relation to any particular subject are specially pointed out by statute, the mode so prescribed must be substantially pursued. *Shivers v Wilson, garn. of Walker et al.* 130
5. A court of limited jurisdiction must show its jurisdiction on the face of its proceedings. *Ib.*
6. The act of 1795, *ch* 56, regulating the manner of issuing attachments, is limited in its operation, and nothing done under it is valid, unless its provisions are substantially complied with. *Ib.*
7. Under the constitution and laws of the *United States*, the courts of the state have exclusive jurisdiction of the offence of conspiracy committed against the bank of the *United States*, notwithstanding that bank was chartered by an act of congress. *The State v Buchanan, et al* 361
- 8 The previously vested jurisdiction in the state courts cannot be supposed to be taken away by the mere potential right of congress to make a certain crime an offence against the *United States*, and to give exclusive jurisdiction thereof to the courts of the *U S* where there has been no exercise of that right. *Ib.*
- See Evidence 21, 22, 23, 24, 25, 26.
- Insolvent Debtors 1, 2.
- Instance 1, 2.
- Slander 2.

JURY AND JUROR.

- 1 Where one of the jury gets sick in the course of the trial of a cause, and the verdict is rendered, with the consent of the parties, by the remaining eleven jurors, can advantage be taken of it, on an appeal? *Quere. Law v Scott*, 433
- 2 Whether or not the plaintiff consented that the sheriff should make return of a writ in a particular manner, is a question of fact for the jury. *Hayes v Lusby*, 455
- See Evidence 41.
- Facts
- Fraud 2.
- Grant 6, 7.

L.

LACHES & LENGTH OF TIME.

- See Court of Chancery 17.
 — Jurisdiction 3.
 — Limitation of Actions.

LAND LAW.

- See Jurisdiction 3.

LAWS.

- See Foreign Laws 1.

LIABILITY.

- See Bond 1.

LIFE ESTATE.

- See Estate for Life.

LIMITATION OF ACTIONS.

1. The admissions of one partner after the dissolution of the partnership, are sufficient to take a debt due from the partners out of the statute of limitations. *Ward v Howell, et al.* 60
 2. Where a tract of land was granted to A in 1694, and an adjoining tract was granted to B in 1695, and B entered upon a part of A's land, and it was possessed, used, and occupied by B, and those claiming under him, for upwards of 100 years, a conveyance will not be presumed from A to B for the land so possessed, nor that there had been an actual ouster of such part. But if B, and those claiming under him, were in the adversary, uninterrupted, and exclusive possession, by enclosure, of the land in dispute, for 20 years, in such case A will be barred by the act of limitations. *Hammond v Ridgely's Lessee*, 263
 3. A plea of the act of limitations is not a bar to an action on a testamentary bond of more than 12 years standing, where the person bringing the action does not become of age until 17 years after the date of the bond, and 4 years before the institution of the suit. *Welch v The State use of Smith*, 369
 4. The act of limitations, if relied on, must be pleaded *Merryman, et al v The State at inst Harris &c* 425 (note)
- See Court of Chancery 17.
 — Ejectment 5.
 — Possession 3.
 — Way 4, 5, 6.

LIVERY OF SEIZIN.

- See Conveyance 4, 5.

LOCATION OF LANDS.

1. Where the whole of a tract of land is located on the plots in the cause, a deed, conveying the whole, may be given in evidence, though it is not itself located. *Beall's Lessee v Bayard* 127
 2. If a deed contains less than the entire tract, it cannot be given in evidence without being located on the plots in the cause, notwithstanding the location of the entire tract. *Ib.*
 3. Where a deed reciting that A F was seized in fee of a tract called B lying in A county, which was granted by the proprietary to T F, and by T F conveyed to J C, and by J C to A F, and that A F had bargained and contracted with T B for the sale of the said tract as shall not have been affected by elder surveys—and then professing for the sum of \$5000, which had been decreed to A F by the chancellor, to convey to T B the said tract, as corrected by a survey made by decree of the chancellor, the metes bounds courses and distances being then established; to have and to hold the said tract thereby granted, to the said T B and his heirs" &c. It was held, that such deed conveyed only the quantity of land included within the metes and bounds &c. established by the chancellor, and could not be given in evidence unless located on the plots in the cause. *Ib.*
- See Grant.

M.

MALFEASANCE.

- See Deputy Sheriff 1.

MALICE.

- See Slander 4, 5.

MANUMISSION.

1. A slave over 45 years of age cannot be manumitted. *Hall v Mullin*, 190
 2. A devise of property, real or personal, to a slave, by his owner, entitles the slave to freedom, by implication. *Ib.*
- See Attestation 1.
 — Delaware 1.
 — Freedom 2, 3.

MAY.

1. The words "may assign," and "may suggest" used in the statute of 8 & 9 William III, ch. 11, s. 8, relate to the assigning breaches, &c. have

been construed imperatively, shall assign, and shall suggest. *Wilmer v Harris*, 2 (note) 8

MEMORANDA.

See Evidence 20.

MINORS.

See Infants.

MISCONDUCT.

See Evidence 39.

MISRECITAL.

See Bond 1.

MORTGAGE.

1. A mortgagor is considered the substantial owner of the property mortgaged, and he is capable of transferring or vesting his interest at his own pleasure so long as the right of redemption exists. *Ford, et al. v Philpot, et al.* 312
2. The interest which a mortgagor had in lands mortgaged by him, was, before the acts of 1795, ch. 56, and 1810, ch 160, liable to be attached, condemned, and sold under a *fiere facias*. *Ib.*
3. Whether or not in permitting a mortgagor, out of possession, to redeem, he can be compelled to pay in addition to the mortgage debt, the value of extensive, permanent and beneficial improvements placed on the land by the mortgagee? *Quere. Ib.*

MORTGAGEE & MORTGAGOR.

See Mortgage.

N.

NAME.

- See Corporations 2.
 — Ejectment 1.
 — Formula 1.
 — Promissory Note 1.

NAVIGABLE RIVERS.

See Grant 8, 9, 10, 14, 12, 13.

NAVIGABLE & UNNAVIGABLE WATERS.

See Grant 8, 9, 10, 11, 12, 13.

NECESSITY.

1. The doctrine of necessity is applicable to persons who are driven from their own country and seek an asylum in this country, bringing with them their slaves, &c. *Baptiste v De Volunbrun*, 97

NE EXEAT.

1. A writ of *ne exeat* cannot issue for a debt founded on a promissory note not due. It can only issue where the demand is an equitable one. *Cox's Ex'rs. v Scott*, 384
2. The form of a bond to be executed by the defendant on a writ of *ne exeat* being served on him, set out. *Ib.* 385.

NEGROES AND SLAVES.

See Slaves.

NEW TRIAL.

1. The refusal of an inferior court to grant a new trial cannot be assigned for error. *Anderson v The State*, 174
 See Court of Appeals 3.

NON USER.

1. If there has been no necessity for instituting a prosecution for conspiracy, &c. no argument can be drawn from the *non user*; for resting on principles which cannot become obsolete, it has always existed to be applied as occasion should arise. *The State v Buchanan et al.* 358
2. An adversary user of a private way for 20 years is a sufficient ground for the jury to presume a grant of such way; and if so, it must follow that the non user of the right for 25 years authorises the presumption of its release. *Wright v Freeman*, 467

NOTES.

See Evidence 20.

NOTICE.

1. Proof cannot be given of the contents of a paper in the possession of the opposite party, unless notice has been given to him to produce it. *Kennedy v Fowke*, 63
 See Commission and Commissioners 3, 4.
 — Conveyance 4, 7.
 — Corporations 3.
 — Sheriff 2.

O.

OBLIGOR.

See Admission 1.

OFFICE AND OFFICER.

1. The printer of the state, holding his office under an annual salary, is not entitled to additional compensation for any duties by him performed as such, *Chandler v The State*, 284

2. A judge is not entitled to compensation for the performance of extra judicial services imposed upon him after the date of his commission. *The State v Chase*, 297

3. Services performed by the chief judge of the third judicial district, as chancellor, under the acts of 1805, *ch. 65, s. 19, 1806, ch. 55, s. 2*, and 1811, *ch. 189*, are judicial services. *Ib.*

See Judicial Duties 2.

OMISSION

See Acknowledgments of Deeds 1.

— Formula 1.

OPINION.

See Binding Decision

— Court of Appeals 1, 2, 3.

— Evidence 38.

ORPHANS COURT.

1. The act of February 1777, *ch. 8*, authorising a plenary proceeding by libel and answer, and directing the orphans court to summon a jury of 12 freeholders to their assistance on the issue *devisavit vel non*, is repealed by 1798, *ch. 101 Barroll & Can- nell v Reading*, 175

2. Under the act of 1798, *ch. 101, sub. ch. 15, s. 16, 17*, either party concerned in the question, whether a will shall be admitted to probat, has a right, at any stage of the proceedings in the orphans court, prior to a final decision, to have a plenary proceeding directed, and an issue sent to a court of law for trial. *Ib.*

3. If the orphans court refuse such a proceeding, it is a proper subject for an appeal to this court. *Ib.*

OUSTER.

See Presumption 1.

OVERSEER:

See Contract 1, 2, 3, 4, 5.

P.

PARENT AND CHILD.

See Seduction.

PAROL AGREEMENT.

1. If an answer to a bill in chancery for the specific performance of a parol agreement, admits the agreement, and does not rely on the statute of frauds, the agreement will be enforced. *Jones v Stubby*, 372

2. An agreement by parol cannot operate to extinguish an old right of

way, or to create a new one—it simply amounts to a license, and as such may be revoked by either party. *Wright v Freeman*, 467
See Agreement 1

PAROL EVIDENCE.

See Answer in Chancery 1.

— Evidence 2, 12, 19, 30, 32, 33, 37, 46, 47.

PARS RATIONABILIS.

See Widow 1.

PARTIES.

1. If a trustee employs an agent to bid for him at his own sale, and he does bid, and the property is struck off and conveyed to him, and then reconveyed by the agent in pursuance of the previous agreement, in a bill in equity to set aside both these deeds, it is unnecessary to make the agent a party. *Davis v Simpson et al*, 147
See Court of Chancery 1, 2, 4, 10.

PARTNERS & PARTNERSHIP.

See Admissions 1.

— Insurance 9.

PAYMENT.

1. Where notes had been paid at bank for another person, and they were not produced, nor any legal account given of them, evidence of such payment cannot be given. *Wilmer v Harris*, 3
See Principal and Surety 3, 4, 7, 8, 9, 10, 11.

PEDIGREE.

See Evidence 6.

PENAL LAWS.

See Construction 1.

PENALTY.

See Way 2.

PENNSYLVANIA.

See Foreign Laws 2.

— Slaves 5, 6.

PLAINTIFF.

See Cestui Que Use 3.

PLEADING.

1. In a count of general jurisdiction, the personal disability of the plaintiff to sue, can only be taken advantage of by plea in abatement. *Shivers v Wilson, garn of Walker et al*, 139

2. The plea of the act of limitations if relied on must be pleaded. *Merryman et al. v The State at the inst. of Harris, &c* 425 (note.)
3. When a plea does not profess to be an answer exclusively to either of the counts in a declaration, it is to be taken as a plea to the whole declaration, and a demurrer to such plea does not work a discontinuance. *Hughes v Sellers adm'r of Rea.* 432
4. In an action of debt on bond given for the purchase money of land sold, referring to a bond of conveyance of the land, if the defendant pleads that a conveyance of the land was a condition precedent to the payment of the money, it is incumbent on him to make proof of the bond of conveyance, and his not doing so, renders the plea bad upon demurrer. *Ib.*
5. Whether the plea of *non cul* as to part of the words charged in the declaration in an action of slander, and justification as to the rest, is one or two pleas? *Quere Law v Scott* 433
6. No dilatory plea can be received after the rule day, unless the fact upon which it is founded occurred subsequent to the rule day. *Whittington v The Farmers Bank, &c.* 489
7. The general issue being pleaded, the plaintiffs are not bound to show that they are a body corporate. *Ib.*
See Covenant 2.
— Evidence 41.
— Limitation of Actions 3,
— Slander 2
— Son Assault Demesne.

PLENARY PROCEEDING.

See Orphans Court 1, 2, 3.

PLOTS.

See Grant 20.

— Location of Lands.

POLICY OF INSURANCE.

See Insurance.

POOR AND POOR RELATIONS.

See Devise 13, 14, 15.

POSSESSION.

1. The will of a husband does not pass his wife's land, and no possession of the same by a devisee under the will can create a presumption of title. *Bowie v O'Neale et al. Lessee,* 226
2. He who has title to a tract of land, and is in possession of part, is in possession of the whole; and if two persons are in possession of the same land, the one by title, and the other by wrong, it is his possession who has

the right. *Hammond v Ridgely's Lessee,* 263

3. If the grantor in a deed is in possession of part of the tract of land conveyed, that possession will extend to the whole tract, unless there had been an adversary, uninterrupted, and exclusive possession, by enclosures of a part of the land by some other person for 20 years prior to the execution of such deed. *Ib.* 265

See Conveyance 4, 5.

— Ejectment 5.

— Limitation of Actions 2.

PRACTICE.

1. A practice long settled, if it originated in error, is not to be shaken. *The State v Buchanan, et al.* 331
The State v Chase, 303
- 2 No dilatory plea can be received after the rule day, unless the fact upon which it is founded occurred subsequent to the rule day. *Whittington v The Farmers Bank of Somerset and Worcester,* 489
- 3 The general issue being pleaded, the plaintiffs are not bound to show that they are a body corporate. *Ib.*
See Evidence 8.

PRECEDENT CONDITION.

See Pleading 4

PRECEDENTS.

See Common Law 3.

PRESUMPTION.

1. Where a tract of land was granted to A in 1694, and an adjoining tract was granted to B in 1695, and B entered upon a part of A's land, and it was possessed, used, and occupied by B, and those claiming under him, for upwards of 100 years, a conveyance will not be presumed from A to B for the land so possessed, nor that there had been an actual ouster of such part. *See* Limitation of Actions 2, and *Hammond v Ridgely's Lessee,* 263
2. An adversary user of a private way for 20 years is a sufficient ground for the jury to presume a grant of such way; and if so, it must follow that the non user of the right for 25 years authorises the presumption of its release. *Wright v Freeman,* 467
See Acknowledgment of Deeds 1.
— Commission & Commissioners 2.
— Corporations 4.
— Grant 1,
— Husband and Wife 2.
— Possession 1.
— Way 5.

PRINCIPAL AND AGENT.

1. Where commission merchants sell the goods of their principal, and the purchaser accepts from them a bill of parcels stating him to be the purchaser, the bill of parcels is a sufficient memorandum of the contract within the statute of frauds. *Batturs v Sellers and Paterson*, 117
2. If the fact be that the sale is for and on account of the principal, such bill of parcels is sufficient to gratify the statute of frauds, though the name of the principal does not appear in it, and though it be made out in the names of the commission merchants. *Ib.*
3. The acceptance of such a bill of parcels is a sufficient recognition by the purchaser of the authority of the commission merchants to sign his name. *Ib.*

PRINCIPAL AND SURETY.

1. If a bill is filed by an endorsee of a promissory note against the drawer to vacate a deed, &c. and the debt is subsequently paid by the endorser to the complainant, the suit cannot be carried on for the use of such endorser, but the bill will be dismissed without prejudice. *Heighe et al. v The Farmers Bank*, 68
2. — The endorser may perhaps, by a bill in his own name, afterwards set aside the deed, and recover the amount paid to the first complainant. *Ib.*
3. Where the original defendant in a *supersedeas* judgment pays the debt, whether with his own money or that of others, the sureties in the *supersedeas* are discharged, notwithstanding such original defendant may cause the judgment to be entered for the use of the persons from whom he borrows the money with which he pays the judgment or debt. *Burnett and Higden v Courts*, 78
4. The *cestui que use* of judgments against a principal debtor and his surety, on receiving payment from the surety, can make no such assignment in the surety's favour as is provided for by the act of 1763, *ch. 23*. *Greager v Brengle*, 234
5. — That act contemplates only assignments by *legal plaintiffs*. *Ib.*
6. Whether a surety, as assignee of a judgment against his principal, under the act of 1763, *ch. 23*, can proceed against the special bail of the principal? *Quere.* *Ib.*

7. A surety, on paying a judgment of his principal, may in equity compel the creditor to assign the judgment, with all the liens given by the principal to secure it. *Ib.*
8. At common law, if a surety in a bond, whether joint or several, pays the debt to the creditor, he may, in an action against him by the creditor, plead such payment in bar. *Ib.*
9. — So, if such payment be made after judgments on the bond, and the creditor then proceeds against the bail of the principal, the bail can discharge himself by pleading the payment. *Ib.*
10. Although a court of equity will compel an assignment of a judgment against a principal debtor, which has been satisfied by the surety, it will not authorise the surety to proceed against the special bail of the principal, unless such bail is *absolutely fixed* at the time of the assignment. *Ib.*
11. H having a judgment against B, and M his surety, issues a *feri facias* thereon, the sheriff makes the amount of the judgment, but only pays a part of it to H, and the balance is paid H by M, the surety, they (H and M,) not knowing that there were funds in the hands of the sheriff—*Held*, that M's payment does not discharge H's claim against the sheriff, but that the same operates as an equitable assignment of such claim to M, for which he may sue the sheriff's bond. *Merryman, et al. v The State at the inst. Harris*, &c. 423

PRINTER.

See Office and Officer 1.

PRIVATE ROAD.

See Way.

PRIZE COURT.

See Insurance 7, 2, 3.

PRIVILEGE.

See Descents 2.

PROCEDENDO.

1. On the reversal of a judgment rendered in favour of the traversers in a criminal prosecution, a *procedendo* was awarded directing a new trial. *The State v Buchanan, et al.* 317
- See Court of Appeals 3.

PROFERT.

See Pleading 4.

PROMISE.

See Bankrupt 1, 2.

PROMISSORY NOTE.

1. If the indorsor of a promissory note has a middle name, his indorsement is good though such name is not set out at length in the declaration. *Hudson v Goodwin*, 115
 2. A blank indorsement must be filled up before verdict, or the judgment on it will be bad. *Ib.*
 3. The hand writing of the drawer and the indorsors of a promissory note being proved, the note may be read in evidence without proof of its having been protested. *Whittington v The Farmers Bank, &c.* 489
 4. The protest of a promissory note is not evidence of itself in chief of the fact of a demand on the drawer. If the notary public was dead, the case would be governed by different considerations. *Ib.*
 5. It is no objection to a protest of a promissory note, which is stated to have been made at the request of *The Farmers Bank of Somerset and Worcester*, instead of *The President, &c.* the corporate name. *Ib.*
 6. In an action on a promissory note endorsed to a bank, the defendant cannot set off against the claim of the bank any stock he may have therein. *Ib.*
 7. The defendant cannot retain in his hands the amount specified in the promissory note on which the action is brought by the bank, although the bank may have in its possession money, dividends of stock, or other profits of the bank, to the same or greater amount belonging to the defendant; he can only claim to have deducted from the note, money or other funds in the possession of the bank belonging to him. *Ib.*
 8. — He has a right to avail himself of any fraud, mistake or imposition, practised on him as an individual; but he cannot, as a stockholder, claim an allowance in an action against him by the bank as the indorsor of a promissory note, for any mismanagement of the president and directors of the bank. *Ib.*
- See Agreement 1.

PROTEST.

See Promissory Note 3, 4, 5.

PROVISIONAL & PERMANENT TRUSTEES.

See Insolvent Debtors 5, 6, 7.

PURCHASE.

See Descent 1.

PURCHASE AND PURCHASER.

See Trustee 1, 2, 3.

Q.

QUESTION.

See Improper Question.

R.

RECITAL.

See Bond 1.

— Conveyance 6.

RECORD.

1. A transcript of the record, certified under the hand of the clerk and seal of the court, with the writ of error annexed, is a legal and sufficient return to such writ of error in a criminal prosecution. *The State v Buchanan, et al.* 317
 2. The record of a deed recorded in the Provincial court in 1737, corrected by the court of appeals so as to make it conformable with the original. *Frazier, et al. Lessee v Hall*, 437, (note)
- See Evidence 40, 41.

REDEMPTION.

See Mortgage 1, 3.

RELATION.

See Trover 1.

RELEASE.

See Conveyance 4.
 — Insolvent Debtor 3.
 — Presumption 2.
 — Way 5, 6, 7, 9.

REMAINDER-MAN,

See Waste 1.

REPLEVIN.

1. In the execution of a writ of replevin, the sheriff must deliver to the plaintiff all the goods replevied, and a symbolical delivery is not sufficient, unless with the consent of the plaintiff; and whether or not the plaintiff did so, consent is a question of fact for the jury. *Hayes v Lusby*. 485
2. A return made by a sheriff to a writ of replevin, that the goods were replevied and delivered, is *prima facie* evidence that the goods were replevied and delivered according to the

return; and a letter from the sheriff to the plaintiff saying he would be security for the future delivery of the goods, cannot be considered as having the double capacity of disproving the *prima facie* evidence arising from the sheriff's return, and establishing a *prima facie* case, that the goods were not then delivered. *Ib.*

REPUTATION.

See Ejectment 1.

— General Reputation.

RESIDENCE.

See Slaves 2, 3, 4.

RESIDUARY DEVISE.

See Devise 16.

RETURN OF PROCESS.

See Sheriff 5, 6, 7.

REVERSIONER.

See Waste 1.

RIGHT OF PROPERTY.

See Insurance 3.

RIGHTS.

See Descents.

RIVERS.

See Navigable Rivers.

— Unnavigable Rivers.

S.

SALE.

See Evidence 6.

— Fraud 1, 3.

— Trustee 1, 2, 3.

SECRET TRUST.

See Conveyance 10, 11, 12.

SECURITY.

See Bond 1.

— Injunction 1.

— Surety.

SEDUCTION.

1. An action on the case *per quod servitium amisit*, will not lie by a father for the seduction of his daughter, where she is above the age of 21, and not in his actual employment—otherwise, where she is under that age. *Mercer v Wolmstey*, 27

2. Where a daughter, either of age or under age, is seduced in her father's house, he may maintain either an action of trespass *q. c. f.* and lay the seduction and loss of her service, as consequential, or an action on the case. *Ib.*

3. If a daughter is above the age of 21, very trifling acts of service are sufficient evidence of her being in fact the servant of her father. *Ib.*

4. Whether a father can support an action *per quod servitium amisit*, where his daughter is above the age of 21, without proving some acts of service? *Quere.* 76.

5. A father, as such only, cannot maintain an action *per quod servitium amisit*, for the seduction of his daughter. *Ib.*

6. Whether a father may bring this action for the seduction of his daughter, under the age of 21, although she does not reside with him, and has no intention of doing so, and although such intention is known and assented to by the father? *Quere.* *Ib.*

SEIZURE.

See Insurance 3, 5.

SENATOR OF UNITED STATES.

See Evidence 37.

SET OFF.

See Bank 4, 6, 7, 11, 12.

SHERIFF.

1. If a sheriff seizes property under a *feri facias*, and returns it unsold for want of buyers, and goes out of office, the *venditioni exponas* must be issued to him, and not to his successor; and if issued to his successor, all his acts under it are void. *Purl's Lessee v Duvall*, 69.

2. In a sheriff's deed, as trustee of an insolvent debtor, under the act of 1774, *ch* 28, it is not necessary to state the exact notice given by him of the time of the sale of the property mentioned in the deed. *Winingder v Diffenderffer's Lessee*, 181.

3. A deed from a sheriff to a vendee, at a sale under a *feri facias*, is not necessary to pass the legal estate, but the same becomes vested in the vendee by operation of law. *Boring's Lessee v Lemmon*, 223.

4. H having a judgment against B, and M his surety, issues a *feri facias* thereon, the sheriff makes the amount of the judgment, but pays only a part of it to H, and the balance is paid H by M the surety, they (H and M) not knowing that there were funds in the hands of the sheriff—*Held*, that M's payment does not discharge H's claim against the sheriff, but that the same operates as

an equitable assignment of such claim to M for which he may sue the sheriff's bond. *Merriman et al v The State at the inst. of Harris, &c.* 423

5. In the execution of a writ of replevin, the sheriff must deliver to the plaintiff all the goods replevied, and a symbolical delivery is not sufficient, unless with the consent of the plaintiff; and whether or not the plaintiff did so consent is a question of fact for the jury. *Hayes v Lusby,* 485
6. If a sheriff makes a return of process in a particular manner, with the consent and approbation of the plaintiff, whether the return be true or false, the plaintiff cannot maintain an action for a false return against the sheriff. *Ib.*
7. A return made by a sheriff to a writ of replevin, that the goods were replevied and delivered, is *prima facie* evidence that the goods were replevied and delivered according to the return; and a letter from the sheriff to the plaintiff, saying he would be security for the future delivery of the goods, cannot be considered as having the double capacity of disproving the *prima facie* evidence arising from the sheriff's return, and establishing a *prima facie* case, that the goods were not then delivered. *Ib.*

See Deputy Sheriff

SLANDER.

1. To charge another with burning a barn, is, *per se*, actionable. *House v House,* 125
2. In an action of slander for words spoken, by which the nomination of the plaintiff to an office of profit was rejected by the senate of the U S the defendant's pleas of guilty as to part, and a special justification as to the residue, and that the words were spoken out of the limits and jurisdiction of the state—*Held* to be bad on demurrer. *Law v Scott,* 438
3. If the defendant, in an action of slander, at the request of a senator of the U. S. to give him information as to the fitness of the plaintiff for the office to which he was nominated, spoke the words charged in the declaration, and referred to the records of a court for their confirmation, the action cannot be sustained. *Ib.*
4. Falsehood and malice are the gist of the action for defamation, and where they are not implied from the words themselves, they must be proved. *Ib.*
5. Words spoken to a senator of the U. S. not voluntarily, but at the request of the senator, as to the plaintiff's fitness for an office to which he is nominated, do not imply malice. *Ib.*
6. Whether the plea of *non cul* as to part of the words charged in the declaration, and justification as to the rest, is one of two pleas? *Quere. Ib.* See Evidence 38, 39.

SLAVES.

1. The act of 1793, ch. 67, prohibiting the importation of slaves, is applicable only to *voluntary importation*, and where the importer intends to sell the slaves, or to reside himself in the state. *Baptiste, et al. v De Volunbrun,* 86
2. An owner of slaves, driven from St. Domingo by the insurrections in that island, and coming with his slaves into this state, is not within the prohibition of the act of 1796, provided he does not intend to reside permanently in the state, or to sell the slaves. *Ib.*
3. The declarations of such owner, of his intention to return to the island when the troubles there had ceased, are evidence of such intention, and if he does not become a naturalized citizen, are conclusive evidence, and this although he continues actually to remain here for any number of years. *Ib.*
4. If such owner goes first with his slaves, on his flight from St. Domingo, to some other of the United States, and remains there for several years, and then comes with them into this state, because the climate of such other state was injurious to his health, he is not within the prohibition of the act of 1796. *Ib.*
5. Whether the owner of a slave has been a sojourner in Pennsylvania with such slave, and has sent him away within six months, within the meaning of the statute of that state of 1780, ch. 870, are facts to be left to the jury. *Davis v Jacquin & Pomerail,* 109
6. If a slave, belonging to a citizen of this state, should be declared free by the judgment of a court of competent jurisdiction in Pennsylvania, when he would not be entitled to freedom under the laws of this state—Whether or not such judgment would be binding here? *Quere. Ib.*
7. A slave carried at different periods to Virginia, by his owner residing in this state, and employed in working at his stone quarry, the several periods amounting in the whole to one

year, such slave is entitled to his freedom under the laws of *Virginia*.

Ib. 107 (note.)

3. Negroes held and claimed as slaves are presumed to be slaves. *Hall v Mullin*, 190

9. A slave over 45 years of age cannot be manumitted *Ib.*

10. The condition of slaves does not depend exclusively either on the civil or the feudal law. *Ib.*

11. No contract, of any validity whatever, can be made with a slave, without the consent of the owner. *Ib.*

12. A devise of property, real or personal, to a slave, by his owner, entitles the slave to freedom, by implication *Ib.*

13. Whether or not property acquired by a slave, with or without the consent of the owner of the slave, vests in such owner? *Quere.* *Ib.* 192

See Freedom.

— Widow 1.

SOJOURNER.

See Slaves 2, 3, 4, 5.

SON ASSAULT DEMESNE.

1. Whether or not the defendant in an action of assault and battery has supported his plea of *son assault demesne*, is for the consideration of the jury on the evidence. *Barnes v Gray*, 436

SPECIAL AGREEMENT.

See Agreement.

SPECIAL AUTHORITY.

See Attachment 1, 2, 3, 4.

— Commission & Commissioners 1.

— Evidence 21, 22, 23, 24, 25, 26.

— Insolvent Debtors 1, 2.

— Jurisdiction 1, 2, 3, 4, 5, 6.

SPECIAL BAIL.

1. Whether a surety, as assignee of a judgment against his principal, under the act of 1763, *ch.* 23, can proceed against the special bail of the principal? *Quere.* *Creager v Brengle*, 234

2. At common law if a surety pays a judgment against the principal, and the creditor proceeds against the bail of the principal, the bail can discharge himself by pleading payment. *Ib.*

3. Although a court of equity will compel an assignment of a judgment against a principal debtor, which has been satisfied by the surety, it will not authorise the surety to pro-

ceed against the special bail of the principal, unless such bail is absolutely fixed at the time of the assignment. *Ib.*

SPECIAL DEMURRER.

1. A special demurrer to a count in a declaration of general *indebitatus assumpsit* for a certain sum, without setting out the cause or consideration upon which the debt accrued, ruled good. *Chandler v The State*, 284

2. A special demurrer to an indictment for a conspiracy. *The State v Buchanan, et al.* 323

SPECIAL DESCRIPTION.

See Devise 12.

SPECIFIC PERFORMANCE.

See Parol Agreement 1.

STATE (THE)

See Action 1.

— Writ of Error 3.

STATUTE OF FRAUDS.

1. Where commission merchants sell the goods of their principal, and the purchaser accepts from them a bill of parcels stating him to be the purchaser, the bill of parcels is a sufficient memorandum of the contract within the statute of frauds. *Bathurs v Sellers and Patterson*, 117

2. If the fact be that the sale is for and on account of the principal, such bill of parcels is sufficient to gratify the statute of frauds, though the name of the principal does not appear in it, and though it be made out in the names of the commission merchants. *Ib.*

3. The acceptance of such a bill of parcels is a sufficient recognition by the purchaser, of the authority of the commission merchants to sign his name. *Ib.*

See Contract 7, 8, 9.

— Parol Agreement 1.

STATUTES.

1. Certain *British* statutes construed or explained, &c.

8 & 9 *Wm.* III, *ch.* 11, 1
5 *Geo.* II, *ch.* 7, (*American Colonies*.) 316

33 *Edw.* I, *Stat.* 2 (*Conspirators*) 317

43 *Eliz.* *ch.* 4, (*Charitable Uses*) 392

2. *Kitty's* Report of *British* Statutes—
The authority it is entitled to. *Dashiell, et al. v The Attorney General*, 403

See Acts of Assembly.

— *British* Statutes,

SUBSTITUTION.

See Principal and Surety.

SUIT.

See Action.

SUPERSEDEAS.

See Principal and Surety 3.

SURETY.

See Agreement 1.

— Assumpsit 6.

— Bond 1.

— Injunction 1.

— Principal and Surety.

SURVEY AND SURVEYOR.

1. The depositions of witnesses taken on a survey made under a warrant of resurvey issued by order of court, if the witnesses are dead, are competent evidence, and the surveyor is a competent witness to prove where such witnesses were sworn on the survey. *Bowie v O'Neale et al. Lessee*, 226

2. If a certificate of survey, made by the surveyor of B county, includes land lying in A county, a grant, on a caveat, would be refused for the land in A county. But if a grant was obtained, and there was no fraud in its obtention, it will operate to pass the land. *Hammond v Ridgely's Lessee*, 261

See Evidence 30.

T.

TENANT.

See Waste 1.

TENANTS IN COMMON.

See Ejectment 2.

— Insurance 9.

TESTAMENTARY BOND.

See Administration Bond.

— Limitation of Actions 3.

TRANSITORY ACTION.

See Slander 2.

TRESPASS.

See Seduction 2.

TOLLS.

See Adjacent 1.

TROVER.

1. If the damages recovered by a judgment in an action of *trover* for the

conversion of personal property, be paid by the defendant, and such property was not delivered back to the plaintiff, and accepted by him prior to such action, the right to the property becomes vested in the defendant, and his title has relation back to the time of the conversion. *Hepburn adm'r of Fishwick v Sewell*, 211

2. If the property increases in value between the conversion and the satisfaction of the judgment, the defendant is entitled to the benefit of such increase; if it diminishes in value, he bears the loss. *Ib.*

See Deputy Sheriff 2.

— Fraud 1.

TRUST AND TRUSTEE.

1. A trustee cannot purchase at his own sale either in person or by another, and if he does, it is in law a fraudulent purchase. *Davis v Simpson et al.* 147

2. If the parties, interested in having a purchase by a trustee at his own sale vacated, know the fact of the purchase, and being under no disability to question it, stand by and permit the trustee to improve the property as his own, a court of equity will not afterwards grant them relief. *Ib.*

3. If a trustee employs an agent to bid for him at his own sale, and he does bid, and the property is struck off and conveyed to him, and then re-conveyed by the agent in pursuance of the previous agreement, in a bill in equity to set aside both these deeds, it is unnecessary to make the agent or his representatives a party. *Ib.*

See Conveyance 7, 10, 11, 12.

— Devise 14.

— Evidence 33.

— Insolvent Debtors 5, 6, 7, 11.

— Sheriff 2.

TURNPIKE GATE.

See Adjacent 1.

U. V.

UNDER TENANT.

See Waste 1.

UNNAVIGABLE RIVERS.

See Grant 11, 13.

USAGE.

See Practice 1.

VENDITIONI EXPONAS.

See Fieri Facias 1.

— Sheriff 1.

VERDICT.

1. Whether the verdict and judgment in one action of ejectment is a bar to a recovery in another action for the same land, &c.? *Quere. Hammond v Ridgely's Lessee,* 267
2. Where one of the jury gets sick in the course of the trial of a cause, and the verdict is rendered, with the consent of the parties, by the remaining eleven jurors, can advantage be taken of it, on an appeal? *Quere. Law v Scott,* 438

VIRGINIA.

See Foreign Laws.

— Slaves 7.

VOID AND VOIDABLE.

See Contract 6, 10

— Conveyance 10, 11.

— Devise 13, 14, 15.

— Erasure 1, 2.

— Fieri Facias 1.

— Grant 1, 15.

— Jurisdiction 1, 3.

— Sheriff 1.

VOLUNTARY CONVEYANCE.

See Conveyance 10, 11, 12.

W.

WAIVER.

See Bankrupt 1, 2.

WARRANTY.

See Covenant 2.

— Insurance 1, 2.

WASTE.

1. An action on the case, in nature of waste, can only be brought by a reversioner or remainder-man in fee simple, fee tail, for life, or for years. *M'Laughlin v Long,* 113

WATERS.

See Rivers.

WAY.

1. Where a right of way was granted by the county court under the act of 1785, ch 49, the common law interposed and guarded the enjoyment of this privilege, in the same manner, and to the same extent, that it was wont to perfect a right of way acquired in any of the three modes known to the common law; and an

action on the case will lie for obstructing such right of way. *Wright v Freeman,* 467

2. The penalty inflicted by the act of 1785, ch 49, cannot be recovered by the party having a right of way. The disturbance of the way for which the penalty is inflicted is an offence against the state. *Ib.*
3. An interest in a private way was known to the common law, and a new legislative mode of acquiring such right is not the creation of a new right, but only an additional means by which the right may be acquired. *Ib.*
4. More than 20 years adverse possession and exclusive use of the lands over which a party claims a right of way, cannot be a bar to an action by him for obstructing such right of way. *Ib.*
5. Whether or not such adversary possession would have been a sufficient ground on which the court might instruct the jury to presume a release from the parties interested in the road, to the defendant? *Quere. Ib.*
6. A right of private way, whether acquired under the principles of the common law or statutory provisions, can be extinguished by a release executed by the parties interested in the right of way, to the owner of the soil. *Ib.*
7. An adversary user of a private way for 20 years, is a sufficient ground for the jury to presume a grant of such way; and if so, it must follow that the non user of the right for 25 years authorises the presumption of release. *Ib.*
8. An action on the case may be maintained for obstructions made on the road by the defendant, after the time at which the title of the plaintiff for the road became vested, although the plaintiff had not removed the obstructions which existed at the time he acquired his interest. *Ib.*
9. An agreement by parol cannot operate to extinguish an old right of way, or to create a new one—it simply amounts to a license, and as such may be revoked by either party. *Ib.*

WHOLE BLOOD.

See Descent 1.

WIDOW.

1. If the personal estate of a deceased, after the payment of his debts, is not sufficient to compensate his widow for her thirds, negroes bequeathed

to be free, may be allotted to her as slaves for life. *Negro William v Kelly*, 59

WILL.

1. Has the introductory clause in a will, and the charging the estate devised with the payment of debts, the effect of enlarging the estate of the devisee? *Quere. Fouke et al. v Kemp's Lessee*, 135
2. A codicil in the hand writing of the testator, found with his will, reciting the changes and alterations he intended to make in it as to his personal estate, is a good and valid testamentary disposition of such estate, tho' not signed by him, or attested by witnesses. *Brown's Ex'r. v Tilden, et ux*, 371
3. A will devising real estate was thus attested—"In witness whereof I, this 14th day of June 1817, declare and publish this to be my last will and testament, in the presence of," and witnessed by three witnesses, who proved that the testator, at the time of making his will, appeared cool and collected, and perfectly in his senses, and to understand perfectly what he was about; that a pen was put into his hands, and he said he must make his mark; that one of the witnesses assisted him to make his mark, by pressing his fingers to the pen; that the witness did not perceive that the testator made any effort whatever in making his mark; but he appeared to understand perfectly what he was about; that the witnesses and testator were all in the same room when they commenced subscribing their names, but there were some doubts whether the testator was in the room at the time the last witness had finished subscribing his name. The will was taken by the witnesses to the room in which the testator had been carried, and he was asked if it was his will? And he answered Yes. That the testator, when the witnesses subscribed their names, had his back to the table, and he might have seen them subscribe their names if he had turned his head round, and one of the witnesses believed he could have turned his head or body, but another of the witnesses thought that he could not turn his

head, from his debility or weakness. The county court held, that the execution of the instrument of writing was not according to law, and had not been sufficiently proved, and refused to permit it to be read to the jury; and also refused to permit the evidence, given in relation thereto, to be submitted to the jury. On appeal, reversed by the court of appeals *Mason et al. Lessee v Harrison and Boggs*, 120

See Freedom 1, 2, 3.

— Husband and Wife 2.

WITNESS.

1. Attesting witnesses are not necessary to a deed; and where their names are erased; it is incumbent on the party, wishing to avoid the deed, to prove that the erasure was made after its execution and delivery. *Wickes's Lessee v Caulk*, 36
 2. A party cannot impeach the credit of his own witness. *Queen v The State*, 232
- See Attestation 1.
 — Depositions 1.
 — Erasure 2.
 — Former Trial.
 — Survey and Surveyor 1.

WORDS.

See Slander.

WRIT OF ERROR.

1. A defendant against whom a judgment has been rendered for a misdemeanor, is *ex debito justitiæ* entitled to prosecute a writ of error. *Anderson v The State*, 174
2. Does such writ, during its pendency, work a suspension of execution on the judgment? *Ib.*
3. A writ of error lies at the instance of the state in a criminal prosecution. *The State v Buchanan, et al.* 329
4. A transcript of the record, certified under the hand of the clerk and seal of the court, with the writ of error annexed, is a legal and sufficient return to such writ of error. *Ib.*
5. The allowance of a writ of error by the Attorney General in a criminal case is not necessary. *Ib.* 362

WRONG DOER.

See Deputy Sheriff 1, 2.



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